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OF THE

QUESTION, 577. L. 20
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HOW FAR

IMPEACHMENTS

ARE AFFECTED BY A

DISSOLUTION OF PARLIAMENT?

*Said to be written by Charles Brugge
Esquire, one of the Members for Bristol.*

It is the Power of Impeachments has hitherto preserved the Constitution of this Government from the many Attempts of evil Ministers; and 'tis to that we must always owe the common Safety; and therefore the Possibility, Supposition, or Reality, of a Hardship to a private Person, must not stand in Competition with the publick Safety, nor with the Rights and Liberties of all the People of England.

*Vindic. of Rights of Commons, by Sir H. Mack-
worth—Ld. Somers's Tracts, vol. 8. p. 347.*

L O N D O N :

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THE Author of the following sheets is fully aware, that they are offered to the Public much too late in the discussion of the subject to which they relate, to entitle him to the slightest claim to Originality either of Argument or Illustration.—If this Disavowal was necessary while his work was preparing for the Press, it is become much more so since the publication of a “Review of the Arguments in favour of the Continuance of Impeachments;” in which the course of Reasoning, which he has adopted, has been already so forcibly and elegantly pursued.—The Subject however is certainly both of extent and importance enough to claim the fullest investigation.—

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A different arrangement of the same materials, another view of the same Arguments, may have its use in enforcing truth, and detecting fallacy. This consideration alone has deterred him from suppressing the result of his researches.—The candour of the Public must determine how far it can avail in his justification.

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State of the Question, &c.

THE Dissolution of the last Parliament having put a stop to the actual continuance of the Trial of Mr. Hastings, under an Impeachment by the House of Commons, a Question has arisen as to its legal effect on the proceeding itself. If this be considered abstractedly from the Case on which it arises, and with a reference only to its political consequences, it must be the wish of every unprejudiced mind, that no accidental change of circumstances, no technical objections of form, should impede the course of Justice, or frustrate the exculpation of the accused. If we then turn to History for an account of similar Proceedings, we must be struck to find, that a decision has been solemnly made by the deliberate consent of the two Houses of Parliament, on this very point, which
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was followed by the conviction and execution of one of the persons whom it affected; and, since the Question is still agitated, we are led to ask, *Part I. p. 9.* Whether that Decision was justified by the ancient usage of Parliamentary Judicature, as well as by the acknowledged principles of the Constitution?

Part II. p. 45. What has occurred in subsequent times to affect the validity of that Determination? or, lastly,

Part III. p. 109. Whether it be in itself so inconsistent with technical legal reasoning, that neither authority, nor the idea of general convenience, can avail to support it?—The whole subject will, I believe, be embraced, by considering what can be urged on each of these questions in the order in which they arise.

P A R T I.

THE Decision to which I have alluded is the Resolution of the House of Lords of the 19th of March, 1678-9, which adopted the Report of the Lords Committees for Privileges conceived in these terms ; “ That the Diffolution of the last “ Parliament doth not alter the State of the Im- “ peachments brought up by the Commons in “ that Parliament.” These Impeachments were two ; the first brought up Dec. 5th, 1678, against the Lords Arundel, Powis, Bellasis, Petre, and Stafford ; the second Dec. 23d, against the Earl of Danby, both agreeing in the same charges of Treason and other High Crimes and Misdemeanors, but differing in almost every other circumstance, and the latter only accompanied with Articles exhibited. The former was founded on a belief of the existence of the famous Popish Plot, into the Examination of which the House of Commons had entered with great zeal, and much prejudice, as soon as they were assembled in the preceding October. The Consideration of the impro-
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bability of such a Plot, arising from the Designs attributed to it, the persons supposed to be concerned in it, and the character and deportment of the Witnesses who made the discovery; together with all the hardships to which the accused were exposed in the subsequent stages of various prosecutions, is foreign to the subject of this Enquiry.—In a more popular discussion of it, these topics may be employed with some hopes of success to influence the passions, and misguide the judgment. It will be readily admitted that such was the ferment of men's minds at this time, occasioned by the apprehensions of some, and the designs of others, as to throw a considerable degree of suspicion on every transaction in which this prepossession could operate; but on the other hand it would be unfair to contaminate with this Aspersions any other cotemporary proceedings, which were founded on just and constitutional principles, and free from the political infection of the times—Let it be observed then, that the House of Commons had already carried up their general Impeachment of the five Lords, which those who judge least favourably of their proceedings, think they were in no great haste to prosecute; when their attention was called off from this grand object of National alarm, to an investigation which excited similar zeal, without the imputation of similar delusion. This was the Affair of the Earl of Danby, which was not brought before the
House

House till Dec. 19th, in the manner that is too well known to require repetition here, and proceeded upon with so much dispatch, that on the 23d, as we have seen, not only the Impeachment, but the Articles, were carried up to the House of Peers. It will be sufficient to observe upon this case, to distinguish it from that of the other Lords impeached, that an occasion never presented itself in which the House of Commons more constitutionally exerted their privilege of accusation, or in which the principles on which that privilege is founded were more justly felt and illustrated—I speak not here of the form in which the Articles were framed (which * was opposed by some of the most eminent Lawyers) nor of the subsequent questions that arose in the case; still less of the personal hardships of Lord Danby, who seems to have incurred as little blame in this transaction, as was possible for any confidential Minister of such a Prince; but of the great end of punishment, example, and of the object of that example, the future security both of the crown and people. It was plain that the Interests of the Nation, and those of its allies, had been offered to sale, for a price, the object of which was avowed to be, to enable the King to govern, at least for three years, without the controul of Parliament—The Offence was established, Where was the Offender to be

* Serjeant Maynard, Serjeant Crooke, Mr. Powle.

found? the saving Maxim that the King can do no wrong, which in appearance exalts the Prerogative out of all bounds, but in reality affords the only rational controul to it, was not to be violated: in vain did the King interpose, with * a rashness, that however laudable in private Friendship, was destructive of the first principles of the Government in which he presided, to take upon himself the responsibility attached to the great Offices of the State; the House of Commons pursued their object with firmness; resolved by crushing the hand that executed, to deprive the head that conceived the mischief, of the future means of carrying its designs into effect—With this spirit the Parliament broke up, Dec. 30th, not without some altercation between the Houses on the subject of sequestering Lord Danby—The new Parliament met on the 6th of March, but the House of Commons being engaged in a Contest with the King about the choice of a Speaker, proceeded on no other Business till the 15th of March. In the mean time (on the 11th) the Lords referred it to a Committee to consider “ Whether Petitions of Appeal which were presented to the House in the last Parliament be “ still in force to be proceeded on;” and the

* ——— in me convertite ferrum;
 ——— mea fraus omnis, nihil ille neque ausus,
 Nec potuit. VIRG.

next

next day it is farther referred to them “ To consider of the State of the Impeachments brought up in the last Parliament, and all the incidents relating thereto.” The Prorogation on the 13th prevented any thing being done on these references : they were therefore renewed when the Parliament met again on the 17th of March ; and the next day Lord Effex reported that the Lords Committees “ Upon perusal of the Judgment of this House, 29th of March, 1673, are of Opinion that in all Cases of Appeals and Writs of Error, they continue and are to be proceeded on *in statu quo*, as they stood at the Dissolution of the last Parliament without beginning *de novo*—and their Lordships are of Opinion that the dissolution of the last Parliament doth not alter the State of the Impeachments brought up by the Commons in that Parliament”—to which Report on the next day After some time spent in consideration thereof, the House agreed—and in consequence, on the 20th, Lord Danby was ordered to put in his answer. From this detail it appears, that the whole of the Enquiry which led to this Adjudication, originated in the House of Peers, without the slightest intervention of the Commons, who were certainly the most likely to be infected with the party spirit which has been imputed to this transaction : that its first object was the State of Petitions of Appeal ; a question of general im-

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port as a rule of proceeding, totally unconnected with the prevailing Dissentions of the time; and that, if a political bias must be attributed to this judicial regulation, because the Lords Shaftesbury and Essex presided in these Committees, it certainly was directed more immediately against * Lord Danby, than the five Lords, both as the Impeachment against him was in a more advanced state, than the other; and also from his answer being called for as soon as this decision took place. It is indeed difficult to judge how far private and particular motives may influence the discussion of any public question; but it is obvious that this was a period when a decision on both these points of civil and criminal Judicature in Parliament was likely to be called for: this was the first Parliament, except that which succeeded the short Convention Parliament, that had met after a dissolution by the King since 1640, and as a few years before, the Effect of a prorogation on Petitions of Appeal had been considered, it was natural that now the Enquiry should embrace the case of a dissolution, which not being then foreseen, had not been provided for. If this is a satisfactory account of the introduction of the Subject at this time, its

* This Idea is strengthened by what was said by Lord Anglesea at a Conference, Ap. 12, 1679, on the Bill of Attainder against Lord Danby "That in the transaction of this affair there were two points gained by the House of Commons, one of which was this decision.

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being extended to the question of Impeachment was an obvious consequence ; and if, as has been shewn, the decision of it pointed chiefly at Lord Danby, it is not only, in a great measure, cleared from the suspicion of influence from the popular frenzy, but, as the Lords were certainly in general not very * hostile to that Nobleman, it carries with it the stronger marks of impartiality.

Let us now see on what this Resolution of the Committee, thus adopted by the House, was founded : they state in the first place that it was † “ Upon perusal of the Judgement of the House, “ 29th of March, 1673 ;” and the journal of the House was ready to be produced to authenticate it ; to this then we must refer for such Prece-

* The House of Commons seem suspicious of them through the whole of their proceedings—Sir T. Clarges said in a debate, May the 9th, 1679 : “ the whole manner of the Lords “ proceedings since the plot seems extraordinary, and I despair “ of Justice from them”—the Commons complained of their allowing Lord Danby’s pardon to be argued ; and suffering the Bishops to vote ; and appointing an early day for the Trial of the five Lords, when they intended to proceed against Lord Danby, whom they say they had impeached first by Articles.

Grey’s Debs. Vol. 7.

† It seems extraordinary that Mr. Christian, in his pamphlet on this subject, should have omitted this part of the report in his Appendix of precedents, which perhaps accounts for his saying (p. 28, 2d Edit.) “ That no precedent authority “ or principle whatever is cited or referred to by this “ Committee.”

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dents as it afforded to illustrate the point before them. Whatever was the occasion of that reference, it certainly had no relation to any subject of political difference, being confined to the case of private suits, at a time when no public prosecution was depending, which might be influenced by the determination of it. It was in these terms, “ Whether an Appeal to this House (either by Writ of Error or by Petition) from the proceedings of any other Court, being depending and not determined in one Session of Parliament continue in statu quo unto the next Session of Parliament without renewing the Writ of Error or Petition.” It should be observed however that when the Lords Committees make their Report, and state in it the Matter they understood to be referred to them, there is this material insertion in the terms of the question, viz. “ *Or any other Business wherein their Lordships act as a Court of Judicature and not in their legislative capacity.*” Those who are better acquainted than I am with the forms of the House, will determine, which statement of the question is most likely to be accurate, that taken down by the Clerk when the reference was made, or that returned, as it must have been, in writing, by the Lords who had been employed in the investigation of it: it is sufficient for the present purpose, that they who made the report so considered the question, and accordingly declared their opinion generally; “ That

“ That busineſſes depending in one Parliament,
 “ or Seſſion of Parliament, have been continued
 “ to the next Seſſion of the ſame Parliament, and
 “ the proceedings thereupon have remained in
 “ the ſame ſtate in which they were left when laſt
 “ in agitation;” and that the Houſe approved of
 “ this Report, and *ordered it accordingly*. In order
 to warrant the concluſion they draw, the Committee refer to precedents of a criminal as well as a civil nature, and ſome that apply to a diſſolution as well as a prorogation; which laſt were applicable *a fortiori* to the caſe before them.—What effect theſe had upon their judgement may be collected from the terms in which they convey it; for though they do not chooſe to exceed the limits of the queſtion which they underſtood to be referred to them, yet they cannot refrain from hinting an opinion as to Buſineſſes depending “ *in one Parliament,*” as well as “ *in one Seſſion of Parliament.*” I ſay *hinting*, becauſe it is manifeſt that the ſentence is incomplete as it ſtands, and requires to make it perfect the correlative of “ *the next Parliament,*” as that branch of it which relates to “ *one Seſſion*” is ſupplied with that of “ *the next Seſſion.*”

It appears from the Precedents ſtated in this Report, that in civil caſes which were brought either originally, or by way of Appeal in Parliament, it was uſual to grant a **Scire facias* return-

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* I omit referring to theſe caſes, becauſe Lord Hale, in his
 treatiſe

able in the next Parliament after the Record was brought in. I admit that in ancient times this term was frequently applied to express the *next Sessions*; but it cannot be denied, on the other hand, that it was at least equally adapted to convey the idea annexed to it at present; so that, though every Session might then be considered as a separate Parliament (as to all purposes of legislation it is admitted to be), yet, what was more substantially distinct by a dissolution, must still be comprehended under the same term†. It appears further, that when the case was part heard, a day was given to the parties to appear in ‡ the next Session, or sometimes in the || next Parliament, when

treatise on the Jurisdiction of the Lords House, printed by Mr. Hargrave, states expressly; “regularly the *Scire facias* was “returnable the next Parliament, or the next Session of Parliament;” p. 150. He adds, “But though the award was “such, yet the writ was rarely, if at all, taken out till the “new Parliament summoned.” That is, the House being possessed of the cause by the Record being brought up, ordered the party complained of to attend the decision of it in the *next Parliament*. When the Writ was actually sued out is perfectly immaterial.

† Mr. Christian, who raises this objection, admits that three of the cases were proceeded on in new Parliaments. p. 26.

‡ Case of William de Valentia, 18 Edw. I. and of John, King of Scotland, 21 Edw. I. In these the “*next Parliament*” seems to mean only the “*next Session*.” Report of the Committee, 21 Jac.

|| Case of William de Breouse, 30 Edw. I. most clearly so.

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the cause was proceeded on; that *inquisitions were often granted to ascertain some facts in dispute, and in the mean time the business stood over to the next Session or next Parliament.—In criminal cases it appears that Commissioners were sometimes appointed to †hear the answer of the accused, ‡sometimes to proceed to his trial; the consideration of which, with every thing relative to it, was adjourned to the next Parliament.—Such were the authorities from which this Committee drew the inference above-mentioned, the principle of which is deducible from the very

* Case of Hugh de Lowther, 18 Edw. I.

† Case of the Archbishop of Canterbury. Mr. Christian, who in his first edition thinks this must have been an adjournment only to another Session, because there are no Writs of Summons to the Commons to be found in Prynne's Collection applicable to this time, in his second more reasonably expresses his doubts about this conclusion from the possibility of Writs having existed which were lost before the days of Mr. Prynne. A Summons to the Lords is preserved by Dugdale, p. 222, dated 24 Feb. 1343, 17th Edw. III. for a Parliament to be held on Monday, 15 days after Easter, at which day it appears from the Rolls of Parliament, stated likewise in his Appendix, p. 37. the Parliament met, in which the case of the Archbishop was re-considered.

‡ Case of Hugh Fastoff or Scafolk.—This was at first questioned on the same ground as the former, but it is now admitted to be free from that objection.—It is said indeed to be an original Petition in the new Parliament, which it certainly is, but the object of it shews that the cause was still retained by the Lords, who are desired to proceed in it to his acquittal.

terms of the question, viz. “ the distinction between the businesses in which the Lords act as a Court of Judicature and those which come before them in their legislative capacity.” Without this extension to their judicial proceedings they could never have attained the ends of Justice, when Parliaments sat but for a very short time, and often not in the Metropolis, where the ordinary Courts were usually held.—That this conclusion was fairly drawn as to Writs of Error will hardly be disputed, when it is seen how * Lord Hale expresses himself on this subject recently after it was thus settled : “ What effect (says he) an adjournment by the King (which he had before explained to mean a prorogation) hath, was a business formerly of great debate; but now it is *by use and custom*, and partly by declarative orders, settled. 1. As to Writs of Error and causes depending there as a separate Court from the Commons, heretofore it was held that an adjournment, without special words to adjourn all causes in *statu quo*, had discontinued all such proceedings in the Lords House, and they were put to begin all again;—and thus I remember it was ruled in the House, Bridgeman being Keeper. But since that time, upon search of precedents, it hath been ordered and declared by the Lords, that no discontinuance ariseth in

* Jurisdiction of Lords, p. 167.

“ such

“ such cases by adjournment, but they are to
 “ proceed as they left the cause last Session. *And*
 “ *truly it stands with reason; for these proceedings are*
 “ *in the Lords House as a distinct Court.*” He ap-
 proves, we see, the principle, rests the decision
 upon use and custom as well as declarative orders,
 admits it was always at least doubted, and that
 if the adjournment was special, no causes were ever
 discontinued; which last concession alone is suffi-
 cient for many purposes of this argument—But
 the Committee in 1678 extended this doctrine as
 to Writs of Error to the case of a dissolution—
 They did so, and with great propriety. Many of
 the precedents above-cited directly led them to it,
 and * others are to be found that correspond with
 them;

* 30 Edw. I. William Paynell and Margaret his wife.
 Petition presented in an original suit which was heard in the
 Parliament 28 Edw. I. They were ordered to be at the next
 Parliament to hear judgement.—They came 29 Edw. I. and a
 day was given them to this Parliament 30 Edw. I. when their
 petition was dismissed.

33 Edw. I. The Priors of Durham and Goldyngham.—
 Similar adjournments to two successive Parliaments.

8 Edw. II. Thomas de Ergum—Commission directed to be
 certified to next Parliament. Hugo de Curtency—Similar
 case—Adjourned again to next Parliament.

9 Edw. II. Thomas de Multon—Similar case. Hugo le
 Despencer—Similar case, with two adjournments.

2 Rich. II. The Earl of Salisbury. An enrolment of the
 whole proceedings in the last Parliament is recited, founded
 upon a Petition in Error. The parties appear in this Parlia-
 ment,

them; but beyond that consideration, the principle once applied drew after it this extended consequence.—Lord Hale's reason indeed seems ap-

ment, and after hearing pur ce que cest Parlement si estoit bien pres au fin quant cest besoigne feust issint touchez & plez, &c. mais par assent du Parlement jour ent est donez as ditz Contes en le profch' Parlement toutes choses esteant en mesme l'estat q'ore sont, &c. In the Record here recited, it is said of the proceedings in the first Parliament the Record and Process was delivered to the Chief Justice of the King's-Bench *pur y demurrer comme en garde tan q au dit profch' Parlement*.—This Mr. Christian says (p. 26) “ proves that the Record in a Writ “ of Error was not preserved in Parliament after a dissolution.”—He forgets that the whole account of this case is the Record; it begins, *Item est assavoir qu'il y a un certain Enroulement enroulees es Roules du darrein Parlement. &c.* that the Errors were assigned before the K. B. Record was sent back; that it was mixed with others not complained of, and only given the C. J. for safe custody; that it appears from the last adjournment that whether the Record complained of was left in Parliament or not, every thing remained in *statu quo*; and that the constant practice has been, ever since 1678, not to leave the Record above, but only a transcript.—Lord Hale says it was sent back because the same Roll contained divers other matters. *Jurisd. of Peers*, p. 149.

2 Hen. V. The Earl of Salisbury petitioned for the reversal of the attainder of his father, and the Roll of Parliament being brought in, he assigned the Errors, and was ordered to produce evidence before the Chancellor ad effectum quod materia *p̄dca* eo magis maturari poterit erga prox. Parliamentum, & super hoc dies datus fuit *dcto* nunc Comiti usque ad idem prox. Parliamentum. In the next Parliament he appeared and prayed the Lords ut in loquelâ sua ulterius . . . in formâ juris procederetur—which was done, and judgement given.

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plicable chiefly to this latter case, for in a prorogation both Houses breaking up together seems to offer no ground to consider them as distinct; but on a dissolution one of them is annihilated, and the other can only continue its judicial functions, as being a Court perfectly distinct and independent.—They probably could trace no distinction in the practice of former times, or the reason of the thing, between the case of a prorogation and dissolution to this purpose; we have seen it urged that they were then confounded by the common name of a *Parliament*; and we shall find their identity insisted upon by * those who in later times opposed the application of the principle to the case before us. In this view of the subject, too, the deduction was fair and obvious. It must not be concealed, however, and I wish to give the whole force to the objection, that Lord Hale, whom I have just referred to as giving his sanction to the decision of 1673, writing before that of 1678, says expressly, “ But if the Parliament be
 “ dissolved before Judgement affirmed or reversed,
 “ then the Writ of Error is wholly discontinued
 “ and abated, and the Court below may issue pro-
 “ cess and execution upon the Record remaining
 “ with them without any formal remission of the
 “ transcript from the House of Lords, upon a

* The Lords who protested in the case of Lord Oxford in 1717.

“ suggestion

“ suggestion entered thereof upon the Record before the Judges below that the Judgement is neither affirmed nor reversed.”—I wish to add (to this concession (what perhaps his name alone would sufficiently imply), that he here expresses the sense and practice of Westminster-hall on the subject in his time, established on a resolution of the Judges in the first year of Henry VII.* The Courts of Law, it is obvious, had no other cognizance of this subject, which related to a superior jurisdiction, than what arose from their controul over their own process, in enforcing or suspending the Judgments which they had given. It is natural that they should regard these appeals from their determinations with no very favourable eye; both from predilection for their own opinions, and from the delay which, without some regulation, they necessarily occasioned in the distribution of justice.—Though they could not therefore prevent the House of Lords from deciding ultimately, and at their own time, on all causes which should be brought before them, yet if they discovered any appearance of delay, either in the conduct of the party, or which arose from the accidental circumstances of the case, they would not restrain the person who appeared to them entitled to judge-

* See Flowerdew's Case, Pasch. 1 Hen. VII. 19. Y. Books. Stated expressly, though as it seems extrajudicially, in Sir Christopher Haydon v. Godsalve. Cro. Jac. 341.

ment,

ment, from enforcing it by the proper execution. This they awarded, when a second Writ of Error was sued out, the former having been * superseded or † abated without any fault of the party, or if it was made returnable in the next Sessions of Parliament which was to be held ‡ at a very distant day, as || after a Term had intervened; much more therefore would they be inclined to do it after a dissolution, when the uncertainty of the time of a new Parliament being summoned so greatly encreased the delay. It is plain, however, that this conduct of the Courts of Law had no influence upon the question, Whether the Writ of Error abated or not by prorogation or dissolution? because they ** continued the same practice even after that point was established by the Resolutions of 1673 and 1678. The reason given by the Court of King's-Bench for bailing Lord Danby puts this in the clearest light; †† they say, " That in cases

* Sir Christopher Haydon v. Godsalve. Cro. Jac. 341.

† Crowch v. Haynes. Jones, 66. Anon. Vent. 100.
contra Goston v. Sedgwick. 2 Lev. 93. 1 Mod. 106.

‡ Worley v. Holt. 1 Vent. 31. Sid. 413.

|| Silly v. Silly. 3 Keb. 232.

** *Ld. Ever and Trever.* 26 Car. 2. 1 Vent. 266. 3
Keb. 416.

Sir F. Duncombe's Case. 29 Car. 2. 1 Mod. 285.

Peters v. Benning. 13 Will. 3. 12 Mod. 604.

Ld. Hale on Jurisdic. of Lords, p. 169.

†† *Skinn.* 163.

“ of Writs of Error depending in Parliament
 “ upon a long prorogation they cease to be a
 “ Superfedeas, but the party may have Execution
 “ in the King’s Bench yet the Parlia-
 “ ment, when it meets, may go on; and if they
 “ reverse the Judgement, the party will be restored
 “ to all that he had lost.” Having thus traced
 the practice of the Courts of Law, and examined
 the reason of it, we shall be better enabled to judge
 what weight is to be given to the opinion just
 cited of Lord Hale, the ground of which he im-
 mediately subjoins*; “ for it would be an into-
 “ lerable delay of justice; for no Parliament pos-
 “ sibly would be summoned in seven years; and
 “ it were very unreasonable that the Plaintiff’s
 “ execution upon a judgement obtained should be
 “ so long delayed.” The only objection there-
 fore that he makes to the continuance is the cir-
 cumstance of delay, which consideration we have
 seen regulated the decisions of the Courts of Law
 on this subject; his conclusion therefore is the
 result of Policy, and not of Law. Suppose then
 this possible interval between the meetings of Par-
 liament limited to a moderate extent, and suppose
 such regulations adopted by the House of Lords
 as prevent any abuse of the right of Appeal to
 them, the reason given instantly fails; and we
 shall see nothing in the way to prevent the appli-

* P. 168.

cation of that which he had before applied to the case of continuance after a prorogation, viz. "For these proceedings are in the Lords House as a distinct Court."—If then the reason for this opinion is founded only on collateral considerations, is it better supported by precedent and authority? We have already examined some which seem to prove the contrary, and he himself adds *two decisive instances to the number, in which the House of Lords granted or continued a Superfedeas, while a Writ of Error was depending, till the next Parliament, to which they adjourned the further hearing of the cause. He thinks indeed that the stay of execution was not consonant to

* Case of Dean and Chapter of Litchfield, 4 Hen. IV. n. 26. The Errors being assigned; sur ces, le darrein jour de Parlement le Roi notre Signior commanda de continuer le Proceſſe de celle matire tan q'a proſchein Parlement en l'eſtat q'or eſt.—Rot. Parl. Vol. III.

Case of Joan Beauchamp, 11 Hen. VI. n. 40. She brought a Writ of Error, assigned the Errors, which were argued on both ſides, and then; pro eo quod Cur' Parliamenti prædicti ad tunc non aviſabatur ad judicium in hac parte reddend'; conſideratum fuerit quod prædicta Johanna haberet diem eſſendi coram ipſo Rege in Parlamento ſuo extunc prox' tenend' quandocunque & ubicunque infra regnum ſuum Angliæ teneri contingeret, &c. et quod executioni Judicii prædicti interim ſuperfederetur ex cauſa ſupràdictâ. Jamque præfata Johanna in præſenti Parliamenti quod fuit prox' Parliamentum poſt prædictum Parliamentum obtulit ſe, &c.

Rot. Parl. Vol. IV.

law, for the reason above stated, which applies solely to the question of delay ; and does not refer to any instance in support of his opinion : where the reason given therefore is partial, and a better may be assigned for the contrary, and the practice is adverse, it will not surely be presumptuous to dispute the authority even of Lord Hale, or at least to confine it to such a view of the subject as he appears to have had before him.

The Committee state further, “ That the Dissolution doth not alter the state of the Impeachments brought up in the last Parliament ;” and this is complained of as a violent and partial inference from the precedents before them, some of which however appear to relate to criminal prosecutions. But if they were right in their decision as to Writs of Error (which has received the sanction of succeeding times to this day), will it be said that it bore no analogy to cases of their original, and even criminal jurisdiction, at least so far as related to the record remaining, which was all of the cause that existed in those Impeachments ? The reason given by Lord Hale applies to one case as well as to the other. Suppose then the decision of the House in 1717, that Impeachments were not determined by a prorogation (which has never been attributed to any partial views, and remains the law of Parliament to this day), had preceded that of 1678 ; might they not as well have extended it to the case of a dissolution, as they did that

that of 1673? But the principles and authorities upon which that of 1717 was founded, must have existed before 1678; and, if so, were then equivalent to an adjudication; or, if they arose since, they must have been founded upon that very decision, which the recognition of them supports and establishes.—It cannot now be known whether the Cases cited in the Report of 1673 were the only authorities on which the Committee of 1678 relied; but it will be proper here to refer shortly to such others as are to be found in the Records of Parliament, which though they may not apply to vindicate them from the charge of precipitancy, will tend to support their decision, which is of more importance to the present question.

* 4 Edw. III. Case of Thomas de Berkeley, who was tried and acquitted of murder in one Parliament, but judgement adjourned, and a day given him to the next, till which time he is committed. In the new Parliament he is discharged from his Bail; and a day is given him to the next Parliament.

† 50 Edw. III. Adam de Bury was impeached by the Commons the last day of the Parliament; and not appearing, his goods and chattels were put in arrest.—In the next Parliament, 51 Edw. III.

* The Record at length may be seen at the end of Mr. J. Foster's Discourses, and Rot. Parl. 2. 52.

† Rot. Parl. 2. 330. 374.

the Commons pray that he may be contained in the pardon granted that year, "*Et luy Et ses plegges outrement quittes Et descharges.*" From whence it seems, though nothing very precise appears, that his goods were attached to enforce his appearance in the next Parliament, that in the mean time he came in and gave sureties to the same effect, and that the Impeachment was considered as subsisting in the new Parliament, or there could be no occasion of this application for the discharge of him and his bail.

The same was done in the same year in the cases of John de Leycester and Wauter Sporer.

* 50 Edw. III. William Ellys was impeached, and answered, and a Commission awarded to examine into the truth of his defence. 51. Edw. III. he complains to the Parliament that though he had been acquitted upon these inquests, yet he had been imprisoned for three months and more "*Et desouth mainprise tan q. cet present Parlement*"—It seems that some of the charges against him were made by private Individuals upon which he had been committed, and his Petition confounds them with the Impeachment, but the Inference is the same.

† 4. Ric. II. Sir Rauf de Ferriers was charged with High Treason: he made his defence, and it

* Rot. Parl. 2. 328. 374.

† Rot. Parl. 90. 105.

seemed

seemed to the Lords that he was innocent, and he was discharged upon bail—5 Ric. II. In the next Parliament his sureties state, that they were bound for his appearance before the next Parliament to answer to certain matters, &c. and that since he is present to answer whoever will charge him in that matter, they pray to be discharged, not being bound for his further appearance; which is granted*.—

That this determination was not made so lightly or hastily as has been stated, may fairly be inferred from two testimonies borne to it on very public occasions by persons of considerable eminence, and intimate knowledge of the subject—On the trial of Lord Stafford Sir F. Winnington speaking of this decision, in the presence of both Houses, says, “ it was so agreed at a Conference with the Com-
mons upon search of Precedents in all Ages”—
When it was afterwards thought proper to reverse

* I forbear to state the case of the Duke of Suffolk, 28 Hen. VI. because the proceedings in the second Parliament seem to me to be by way of Bill of Attainder, and not in a judicial course. Lord Hollis, in his Tract on the Jurisdiction of the House of Peers, says “ There are many precedents of
“ orders given to persons to act something in the intervals of
“ Parliament, and to give an account of it to the Lords at the
“ next ensuing Parliament;” and after citing some instances, adds “ By all this it appears, that the Authority of the House
“ of Peers ends not with the Parliament, but their Judgment
“ still continues in full force and power.”—P. 104.

it, Lord Anglesea stated in his protest against that measure, “ that it had been made and renewed
“ upon long consideration and debate, report of
“ Committees of Precedents and former Resolu-
“ tions”—

Certain it is, that in a time remarkable for the recorded difference of opinion in the Lords House, no one stood forward to enter his dissent to this Adjudication, nor even, as far as appears, to oppose it by his vote ; yet at this period all those Peers were probably in the House, who to the number of 31, in the year 1680, gave their voices for the acquittal of Lord Stafford, and who therefore neither believed the story of the Popish Plot, nor were afraid to avow their incredulity ; and consequently were perfectly free from both the delusion and terror, which is supposed by some to have dictated this decision—In the House of Commons it was taken so much as a matter of course, that no intimation is given in the debates of that day that any doubt was entertained on the subject.

In examining the foundation of it, we must not expect that Precedents should be found from early times precisely in point : it is sufficient if the analogy can be traced, which may fairly be done from such as have been referred to. The mode of prosecution itself being adapted only to great State delinquencies, could not, of course, be in frequent use, and as the occasion was pressing the Commons would be urgent in their suit, and the
accused,

accused, from his station, at hand to answer. In times of such simplicity, before Eloquence was considered as the handmaid of Justice, a plain story was soon told, and soon answered, and Judgement followed with as much expedition as in the ordinary trials at Law. In some cases we have seen it was usual to refer the investigation of the fact to Commissioners, who proceeded in the intervals of Parliament; and upon whose report the House of Lords, when reassembled, proceeded as upon Evidence given before themselves—In civil causes, where the less notoriety of the case and the distance of the parties required more time to be allowed, the very form of the summons implied a continuance in the next Parliament, which, from other parties being found necessary in the course of the proceeding, or the intervention of more important business, was often extended to several subsequent ones *. These cases can only apply by analogy to

* Mr. Christian takes some Pains to shew that *Petitions* presented in one Parliament cannot be answered in another; by which if he means *Bills* (which are still in that form) or any thing but a judicial proceeding, it has no reference to this argument:—Such, I believe, are all those to which the King answers in his own person; for to the others the answer was given by the Lords with the King's assent. Impeachments by the Commons were never considered as petitions, though in point of form they might *ask* for Judgement, and in civil cases the Petition, if such, was presented by the party, and was answered by granting the Process which brought his adversary before the next Parliament.

E

criminal

criminal proceedings, and as the practice is to this day conformable to the ancient course the application of them is now as perfect as ever. The precedents of Impeachments themselves that were determined in the same Parliament in which they began, afford no argument either way; nor those, which though not brought to a conclusion, have not been proceeded upon by the new House of Commons; for if it be argued that they considered them as abated, it is not questioned but that they might revive the prosecution from any period at which it can be supposed to have ceased; their not proceeding therefore either upon the original charge or upon a new one, only proves that from some motives of discretion, and not a sense of incapacity, they desisted from the purpose of their predecessors. The only complete precedent in support of this idea, by which the rights of the Commons can be bound, short of their explicit declaration of the law, would be one, in which a new House of Commons had carried up to the Lords a second Impeachment of the same substance and effect as at first which had remained undetermined in the former Parliament. But it is not suggested that any such is to be found: a similar Inference is indeed attempted to be drawn from the case of Drake, in 1660, who was impeached for printing a seditious Book, which he confessed before the Lords having written *—The

* Rapin.

King

King having intimated his intention of dissolving the Parliament in December, the Lords on the 19th of that month ordered “ that if this Parliament be “ dissolved before this House have time to give “ Judgement, the Attorney General should proceed “ against him at law upon the said offence.” From this order it has been argued* that the Lords thought the Impeachment would be determined by the Dissolution, and that they could not give Judgement in the next Parliament without a fresh trial †; and that unless it was at an end the Attorney General could not have prosecuted for the same offence in the inferior Courts. But there is much inaccuracy in this statement of the objection; it assumes that Drake had been convicted by his pleading guilty; whereas he had only confessed being the Author of the Book, and had still a Right, which he was probably disposed to claim, to controvert the ‡ seditious tendency of it, which

* Mr. Christian, p. 61.

† This seems to admit that the Record remained in force, which however appears not to be the opinion of the Author.

‡ The object of it was to prove that the long Parliament still subsisted: a point at least of doubtful constitutional law. The Convention Parliament seem to have met upon this principle, for if they were not dissolved by the abdication of James II. neither were the former by the death of Charles I. They even met for the purpose of summoning a new Parliament, and if they had not authority for this purpose, which was much doubted by the Lawyers of the Time (Vid. 1 Sid. 1.) they alone were the subsisting Parliament.

alone could make it an object of punishment. The Attorney General might therefore unquestionably proceed against him, for it would have been no * plea in abatement that he had been arraigned upon another Indictment (or as in this case Impeachment) unless he had been either acquitted or convicted—If it be said that this doctrine applies only to the case of Indictments in the same Court, and that Drake might still have pleaded to the jurisdiction of the Court below, as Fitzharris did, that plea might have been answered by shewing the order of the Lords, which amounted, whether right or wrong (and wrong it certainly was with respect to the House of Commons) to a dismissal of the Impeachment. Nor is the opinion of the Lords more fairly collected: when Parliament was once dissolved it was extremely uncertain how soon they might be assembled again, and they reasonably therefore preferred speedy Justice from the hands of the ordinary Judges, to dilatory and uncertain punishment from their own †—The Case

* Sir Wm. Withipool's Case, Cro. Car. 147.

† Others have said “ Could not Imprisonment for the interval have satiated their spleen ? ” That they might so have imprisoned whether they thought the Dissolution abated or not, seems clear from the refusal of the King's Bench to bail Lord Danby, which the Court said did not turn on the order of 1678; but why is it to be presumed that they were actuated by spleen and not the love of Justice ?

of the Duke of Buckingham has been alleged for the same purpose: he was impeached on several Articles in the 2d of Car. I. and Parliament having been dissolved in June 1626, and a new one called in March following, no further proceedings were had upon it. In the interval, an Information was filed against him in the Star Chamber, for having administered Poison to the late King, which was one of the charges contained in the Impeachment, but which was not prosecuted to any effect. From this acquiescence of the Commons it is inferred, that they assented to the Idea of the Dissolution having determined their prosecution, as they * are supposed to have still retained their animosity against this Nobleman—To this the obvious answer before given to all such precedents occurs again; if this reasoning be just, why did they not prefer a fresh Impeachment?—Some other motives must therefore be resorted to for their forbearance, and such may fairly be collected from the History of the times: for it seems the Duke,

* It has been said, that instead of going on with their Impeachment, they addressed the King to remove him from his Councils, but I can find no authority for this in any of the Histories of the times. A petition to this effect was presented at the close of the former Parliament, with which the King was so displeased, that he determined to dissolve them: and it was repeated in a remonstrance which the Dissolution prevented them from carrying up to the Throne.—Rapin. Rushworth. Echard.

in order to conciliate the favour of the people, had put himself * ostensibly forward in advising the King to summon the new Parliament, which might very probably operate with the members of it not to pursue against the author of their meeting the resentments of the old one—Add to this, that the objects which engaged their attention were of such magnitude as to supersede even the prosecution of an obnoxious Minister; for in this period the Petition of Right was prepared and carried, and in August of this year the Duke of Buckingham escaped the possibility of further animadversion by a premature death.

On the whole then it may be safely stated, that no † previous precedent is to be found that militates
against

* “ As he (the King) feared the Commons would again “ attack the Duke of Buckingham, he tried to divert them “ from it by a message delivered to the House by Secretary “ Coke. To which the Secretary added, “ The whole Council could bear the Duke witness, he was the first mover of “ calling the Parliament.”—Rapin from Rushworth.

† An argument, much relied on by Mr. Christian, is drawn from the form of the ancient prorogations (none of which however are to be found before the reign of Hen. VI.) in which the reason is given “ *qualiter negotia Parliamenti propter* “ *ipsorum negotiorum arduitatem discuti non poterant nec finaliter* “ *terminari,*” or sometimes, *qualiter negotia per Communes, &c.* and he thinks the effect of this was to continue such matters as were left undetermined in the former session. But it is clear, that *negotia* in these cases relates to legislative proceedings (as
in

against the Resolution of 1678, even if it should be admitted that none had occurred to support it. In particular cases there must be a time when they are first established by practice, to support which it is only necessary to see that it is justified by analogy, not precise similarity to former precedents and principles applicable to the subject. Upon this sort of progressive establishment stand most of the admitted privileges of both Houses, as well as great part of the jurisdiction of Courts of Law and almost the whole of those of Equity. It is in vain to look for Authorities in point into the elder Henrys and Edwards, for much of the present existing law of the Courts. The different State of civilization, of manners, of commercial and political intercourse, precluded the existence of those cases in which that law was established: as they arose in succession of time the respective Courts, as well as the Houses of Parliament, assimilated them to their former rights and powers, and they then became Precedents and Cases to which succeeding times look up with respect and acquiescence. This question had never before occurred in Parliament; when it did, the House of Lords looked to the practice of former times

in the latter instance they necessarily must) which never were continued from Session to Session: nor does the form import so much, for it states they could neither be *discussed* nor terminated, meaning only that the Parliament had not yet gone through all the public business that required their attendance.

both

both in civil and criminal matters, and found in both traces of their continuing to a subsequent Parliament. Their surviving a prorogation afforded likewise a strong inference to the same effect; for as in legislative proceedings each Session is considered as a distinct Parliament, which was observed not to be the case in judicial business, the distinction applied equally to a Dissolution; being founded on the different character and functions of the Court of Parliament and the Court of the Lords *in* Parliament. They could trace no decision that affirmed the contrary, and they thought themselves warranted in applying that doctrine to the case before them. Let us next see how far this resolution was consistent with general principles applicable to this particular subject, and to that solely; for the propriety of it as to cases of error has been acknowledged by the acquiescence of succeeding times.

The Judicature of the Peers in Parliament is as old as the Constitution itself, and strictly conformable to the feudal Genius of it: and the right of the Commons to impeach, though the commencement of it may be traced in practice, stands now upon equal grounds. In all other criminal proceedings, except only that of Appeal, the King is supposed to be the person injured in his Character of Conservator of the Peace of the Kingdom, and though an individual may carry on the trial, he is in substance the prosecutor, and may at his pleasure
put

put a stop to the proceedings. The demise of the Crown had necessarily likewise the same effect, for the person was no more, for whom the Judgment should be given. Impeachments on the other hand are preferred in the name of the Commons of England, and the form is of the essence of the proceeding. On this occasion the Majesty of the Crown gives way to the complaints of the people; and as the objects of these several prosecutions are different, it is of importance that they should be kept distinct. These are directed against persons whom the ordinary process of the Law was supposed incapable of reaching, such as Ministers and Judges; both acting under, and therefore probably supported by, the authority of the Crown—Criminals are therefore supposed who may have invaded the Rights of the people without having done any thing “ Against the King, his “ Crown, and Dignity;” or if the form of it, as a judicial proceeding, may seem to comprehend both those offences, at least it implies that it may be the interest of the people to prosecute those whom it may be the wish of the King to protect. It follows then that it is an absurdity inconsistent with the very foundation of the proceeding, that the Crown should have the same power of controuling it, that it has over its own immediate prosecutions. I admit that this principle has not been deemed of sufficient force to abrogate in this instance the King’s prerogative of pardon, though

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precisely

precisely the same principle is admitted to have that effect in the case of Appeal, another anomalous proceeding in the Law of England; in other words, that our Ancestors forgot or neglected to enforce its application in the former case, and have therefore by tacit connivance through a series of ages established a practice against it, subsisting to this day, as far at least as it is not controuled by the positive law which prohibits a pardon being *pleaded* to an impeachment: but the principle remains the same, and in instances where it has not been contravened by decided usage, should still be applied to the subject, unless we are content to sacrifice that * controul which the people of this Country have long exercised, through their representatives, over undefined emergencies in the Constitution. This power of frustrating the effect of Impeachments by a Dissolution, is even more dangerous than if accomplished by means of a pardon: for that would speak its own purpose, and the adviser of such a measure must stand or fall in the eye of the public by the merits of the Object of it; but

* “ And when there is occasion to debate concerning these
 “ supreme Powers of Kings, Lords or Commons, we must not
 “ argue like Lawyers in Westminster Hall, from the narrow
 “ foundation of private causes of *meum* and *tuum*; but like
 “ Statesmen and Senators from the large and noble foundation
 “ of Government and of the general good of the King and
 “ People.” A Tract on Impeachments by Sir Humphry
 Mackworth in Lord Somers’s Collection. 8. 322.

the

the design of a dissolution could never be enquired into without encroaching upon a clear prerogative of the Crown, or if it could, would never be precisely ascertained. This prerogative thus exerted would be equally prejudicial to the liberties of the subject and the security of the Prince ; it would defeat the most salutary pursuits of public justice, without leaving any one clearly responsible for the failure of it. It would enable a Minister who was accused of having abused the prerogative of the Crown to escape punishment by a repetition of that abuse. It would operate as a great means of persecution against the accused, if he happened to be obnoxious to the Administration, as well as to the House of Commons (such as a great Minister recently removed from Office) who might thus be harassed by an endless prosecution, recommenced perhaps, and that repeatedly, even after he had made his defence, and with the unfair advantage that the disclosure of it would afford. A Dissolution employed for this purpose would often be attended with the most serious detriment to the public service, and yet would be resorted to in order to protect a favourite delinquent, whatever might be the consequence. In short, if the Commons were engaged in a just prosecution, it would be in the power of the King to defeat the object of it by frequent exertion of this prerogative ; if they were disposed to persecute, he might enable them to do it by the same means, to the utter de-

struction of an innocent individual. Such considerations as these are not urged as "affording a ground for the decision in question, but as strengthening the conclusion deduced from precedents by the support of concurrent principle. The objections raised against it on the score of party violence, when allowed their full force, cannot be more fairly estimated than by * Mr. J. Foster, who, on occasion of another determination of the same period, has these expressions, with which I shall close this part of our enquiry : " It must be admitted that precedents drawn from times of " ferment and jealousy, as these were, lose much " of their weight, since passion and party prejudice generally mingle in the contest. Yet let " it be remembered, that these are resolutions in " which both Houses concurred, and in which " the rights of both were thought to be very " nearly concerned : the Common's right of impeaching with effect, and the whole judicature " of the Lords in capital Cases."

* Discourses, p. 146.

PART II.

P A R T II.

LET us next see what has passed in subsequent times to affect the validity of this decision, which was complete, as we have seen, on the 19th of March, 1678-9. The next public occasion in which it was noticed, was at a Conference between the two Houses in the month following, in which Lord Anglesea, then Privy Seal, observed, that in the transaction of this affair, there were two great points *gained* by the House of Commons; “ The “ first of which was, that Impeachments made by “ the Commons in Parliament, continued from “ Session to Session, and Parliament to Parliament, “ notwithstanding prorogation or Dissolution.” What he meant by this expression appears from the Protest signed by him in 1685, and which has been before referred to; as he there justifies this Resolution as founded on previous Authority, it could only be, that the Commons had in this instance obtained a parliamentary recognition of a precedent right. But supposing him so inconsistent with himself, as well as so unguarded in his account

count of the conduct of the Lords, as to intend to assert, that they had of their own authority made a new law upon the subject; the Commons were far from acquiescing in such an idea, and, anxious lest the expression should be so understood, immediately replied, “ That they hoped their Lordships did not think the Commons did take it as if they had now gained any point; for that the points which their Lordships mentioned as gained were nothing but what was agreeable to the ancient course and methods of Parliament.”

The five Lords and Lord Danby having been committed, and Parliament dissolved, and a new one assembled Oct. 17, 1679, during a prorogation of it Lord Stafford applied to the Court of King’s Bench to be bailed, which was refused; “ * the Court not thinking fit in discretion to bail him, and alleging likewise the Resolution of 1678, though they did not rely thereon.”—On the opening of the new Parliament, Oct. 1680, the King in his Speech from the Throne so far gives his sanction, if it were necessary, to the Resolution that the Impeachments were still depending, as to say “ it will be necessary that the Lords in the Tower be brought to their speedy trial.”—That of Lord Stafford took place soon after, and, as is well known, his conviction; the foundation of which, in point of fact, is beside the purpose of

* Raymond, 381.

our Enquiry; in point of Law he urged the objection to which the Resolution of 1678. was an answer; and the Lords, without a single dissenting voice, though there were found thirty-one for his acquittal, * refused to let the question be argued. The impeachment of Sir William Scroggs followed shortly after, and upon the new Parliament being assembled at Oxford, he put in his answer, and without objection petitioned for a speedy trial.—The last Parliament of Charles II. being now dissolved, Lord Danby, who was still a prisoner in the Tower on his original commitment, was brought up to the King's Bench to be bailed, but the Court refused the application. He made a similar attempt † the next year, and argued his own case at great length and with much ability. He complained of defects in the form and ground of his Commitment, and of the hardship of his case, for which there was no remedy to be found unless by the intervention of that Court—He artfully enough endeavoured to avail himself of what had been said by Sir W. Jones, when Solicitor-General,

* This has been stated as a great hardship, but seems conformable to the practice of the other Courts, not to suffer the positive Rules of their proceedings to be drawn in question. It was, besides, a mere point of form, which Lord Stafford might fairly be said to have waived by putting in his answer to the special articles, which being brought up in the new Parliament were liable to the same objection.

† Easter Term, 1682. See his Case in the State Trials.

in

in the case of Lord Shaftesbury, when he applied to the same Court for his discharge; “ That if a
 “ great Minister should be committed, he had the
 “ cure of a pardon, a prorogation or a dissolution;
 “ tion;” which would have been a conclusive argument, at least *ad hominem*, if the Cases had been similar; but he well knew that Lord Shaftesbury was committed only for a Contempt, and that it was always admitted that such orders, which may be equally made by either House, and consequently not in the judicial character which belongs only to *one of them, are of force no longer than the continuance of the Session.—He complained indeed that the Resolution of 1678 was
 “ new doctrine, and never practised till of late;” but his whole argument went to shew that the Court were at liberty to grant his application, which was only to be discharged upon bail, without interfering with the jurisdiction of the Lords; in the same manner as in civil suits the King’s Bench awarded Execution, notwithstanding a Writ of Error in Parliament was sued out, whenever they found it tended to delay and vexation; and added, “ for that he took it for granted that what
 “ is done by that Court and the Courts of Chancery and Exchequer, on Appeals and Writs of

* The House of Commons indeed, in some instances, act as a distinct Court, but only, I believe, in matters relative to their own privileges, and never receive evidence upon oath.

“ Error,

“ Error, was understood not to meddle at all with
 “ the jurisdiction nor proceedings of the Lords
 “ in those cases, and that this was just the same,
 “ all being alike subject to the final determina-
 “ tion of the Lords, whenever they pleased to call
 “ the Writ of Error, Appeal, or Impeachment,
 “ before them, and without any prejudice to their
 “ Lordships proceedings by any of those acts
 “ done by that or the other Courts in the intervals
 “ of Parliament.”—The Court said it was not the
 order of the Lords (viz. that of 1678) that stood
 in their way of bailing him, but the supreme ju-
 risdiction of the Kingdom had laid their hands on
 him; and ordered him to be remanded.—As his
 arguments seemed however to have made some
 impression upon part of the Court, he renewed his
 application the *next Term, but with no better
 success. The Reporter states his Case to have
 been, “ that he was committed by the Lords
 “ House, and there was an Impeachment by the
 “ Commons *pending* in the Lords House against
 “ him”—and adds, “ that it was taken clearly
 “ by the Court that where the party is committed
 “ by an order of the Lords, upon a prorogation
 “ he may be bailed;” and the C. Justice said,
 “ if one be detained after a prorogation, an action
 “ of false imprisonment lies.”—That such is the
 effect of an ordinary commitment by either House

* Skin. Rep. 56.

is admitted by Sir F. Winnington and Mr. Turner (then concerned for the Crown) in * Lord Shaftesbury's Case, and expressly laid down by Lord Holt in that of † The King v. Knollis, to which the modern practice is conformable. It appears from hence, that if the Judges did not rely in these Cases (as we are told by one of them they did not) upon the order of 1678, they must have decided upon principles that were paramount to it. It may indeed be urged, and in some sort collected from the expressions of the Court, that they did not think themselves at liberty to examine the proceedings of the supreme Jurisdiction of the Kingdom; or, as ‡ Lord Guildford held, who was consulted with the rest of the Judges on the subject, that having no power to bring down the Record, they could not be certain but that he might be attainted of treason. But it seems as if the Return to the Habeas Corpus would have shewn whether he was committed before trial or after; and the former objection applies equally to all Commitments by the Lords.—However supreme their Jurisdiction may be supposed to be, it can only exist in cases and over persons subject to their cognizance. Nothing but the continuance of their

* 1 Mod. 155.

† 1 Ld. Raym. 18. If a man be committed by Parliament, and the Parliament is prorogued, the King's Bench will grant a Habeas Corpus.

‡ North's Life of Lord Keeper Guildford, 164. 218.

authority can justify the detaining any one under their orders; and in cases where that is determined by a prorogation or dissolution, the King's Bench finds no difficulty in restoring the party to his liberty. As they take notice of the acts of the Crown affecting the Parliament in one case, why should they not in another, if the effect be the same? Let us suppose that Mr. Hastings was now in custody (it is only by way of illustration that his name shall be introduced in this place), and that no Parliament was sitting, or likely to sit; would the Gentlemen of the Law, who hold that the Impeachment is determined, if they presided in the Court of King's Bench, scruple to release him, at least upon bail? The refusal therefore of the Judges of that day proceeded from a contrary opinion, and if not influenced by the authority of the Lords order must have been guided only by the reason of it. But Lord Danby was reserved for more favourable times, and renewed his application * the next year with better prospects of success. The Court had been recently filled with new Judges, and † Jefferies sat at their head, a man equally desperate in his persecution of the victims of the Court, and his protection of the culprits of the people. It was urged by Mr.

* Hil. 1683.

† Mr. North says his determining to do this business helped to raise him to the post of Chief Justice. Life, &c. p. 118.

Pollexfen, who seems in general to have been his Lordship's adviser, that by the Dissolution the proceeding was determined, like cases of Writs of Error. But even this Court did not venture to adopt that idea, which should have induced his discharge, but alleged that the Lords power of bailing was suspended, and that if he was bailable, it was absurd that no Court should have the power, and they adopted Lord Danby's former argument drawn from the Court's granting execution on Writs of Error when there was a long prorogation; adding, as he had done, "that in one case or the other the Parliament when it meets may go on, and if they reverse the Judgement the party will be restored to all that he had lost, and so they may proceed to the trial of my Lord Danby*," &c. Upon this principle they † discharged him on his giving bail to appear in the next Parliament, as they did likewise, soon after, the four Lords who were under a similar prosecution. It might be the order of 1678 that prevented their being absolutely discharged, but no notice is taken of it in answer to the argu-

* Skinner, 162.

† Mr. North, speaking of the discharge, and of the hardship of the case, says, "If the giving it was irregular, it was erring for Justice; and one would think that such consideration might purge the irregularity—But nothing hath ever been said against it in *publick* yet; and so far all is well." Life of Lord Guildford, 165.

ments of Counsel, and any respect paid to it by such a Court as this is a strong recognition of its authenticity—We have another account given of it at a subsequent period by * Lord Holt, who was at this time concerned for Lord Danby, and who says the chief Reason of his being bailed was that given above; that there was no prospect of an opportunity for him to apply to Parliament for this purpose—He intimates his disapprobation of the measure, by observing that it was denied several times, until the C. J. Jefferies came in, and remarks “ that his being bailed to appear in the “ next Session of Parliament was an Affirmance “ of his Commitment, and a plain proof of the “ opinion of the Court at that time, that the “ Commitment was not avoided or discharged by “ the † prorogation of the Parliament”—The next period in this long-protracted prosecution was that which terminated it on the accession of James the Second—On the first day of the meeting of Parliament the Lords appeared in discharge of their Recognizance, and at the same time presented petitions in different forms—

The Popish Lords stated that they had been committed upon the single testimony of Titus Oates, who had since been convicted of perjury,

* In deciding Lord Salisbury's Case, Carth. 132.

† This is substituted all along by mistake in the Report for Dissolution.

asserted their Innocence, and prayed to be discharged with honour—Lord Danby alleged his long Imprisonment upon an Impeachment founded on bare suggestions of Crimes, and prayed to be relieved either by *Trial* or such other ways as the Lords should judge most convenient, and that in the mean time he might be continued on bail. But the House was more indulgent than Lord Danby's modesty would allow him to hope; and as they had no design of proceeding to trial, they thought it unnecessary to detain them longer under any sort of restraint, and accordingly contented themselves with ordering them “to attend till “further order”—This might have been thought sufficient for relief of the parties in what was certainly a hard Case, leaving it to be seen whether the Commons were disposed to urge the claim which the former House of Lords had allowed; but their zeal for redress went much further; and the next day the House sat it was proposed “upon “consideration of the cases of these Lords contained in their petitions* to reverse and annul the “Order of the 19th Mar. 1678-9 as to Impeach-

* Burnet says the Petitions of the Lords “were sent to the Commons, who returned answer, that they did not *think* “*fit* to insist on the Impeachment—So upon that they were “discharged of them and set at liberty.” 1. 640—But this account must be inaccurate, as there is no such transaction to be found in the journals of Parliament.

“ments,”

“ ments,” which, after some debate, and the previous question being moved, was carried in the Affirmative—The Protest signed on this occasion by Lord Anglesea and two other Lords shews sufficiently the precipitancy with which this step was taken and the reasons to be urged against it. It states that “ it doth extrajudicially, and without a
 “ particular cause before them, *endeavour* an alteration in a judicial Rule and Order of the House,
 “ and that it shakes and lays aside an order made
 “ and renewed upon long Consideration, Debate,
 “ Report of Committees, Precedents, and former
 “ Resolutions, without permitting the same to be
 “ read, though called for by many of the Peers,
 “ and against weighty reasons appearing for the
 “ same, and contrary to the practice of former
 “ times”—How well they were founded in this latter assertion we have already seen; that it was
 “ *extrajudicial*,” and consequently in propriety of proceeding only an “ *endeavour*” to subvert a positive rule, appears from the manner in which it was introduced, which was upon a Consideration of the Petitions of these Lords, none of whom disputed this order or stated any thing that could properly bring it into debate. If the House paid so little Attention as they seem to have done to the rights of the Commons, they might still have found reasons for discharging the Lords in question upon the particular hardship of their case, or even on the ground of the Demise of the Crown, which
 might

might be thought to determine that as well as all other criminal proceedings—They left however that part of the order unrepealed which relates to Appeals and Writs of Error, and thus avowed the partial motives which induced them to invade the other part of it—* They proceeded however no farther, and having thus laid a foundation totally distinct from the ground of their application for discharging the Lords as well as their bail, which they did a few days afterwards, they were little anxious to substitute any Rule, in the place of that which they had invaded, to guide the proceedings of subsequent times—This indeed could hardly have been done without more investigation of the subject, than they were disposed to give, and therefore the point was left by them, at least as it was found by the House in 1678; for it is absurd to suppose that the repeal of an order can of itself establish the contrary rule of practice. If the Resolution of 1678 was well founded, it was an Affirmance of the pre-existing Law of Parliament, and therefore operated as a declaratory law—now the repeal of such a law (for example; the 25th Edw. III. or the Bill of Rights) can not leave the

* Mr. Christian admits “ that if the order of 1678 had “ been merely declaratory of the former law, the reversal “ would have been ineffectual and nugatory,” p. 41. If therefore the former proposition has been established his conclusion will follow.

subject in a worse situation than he was before it was enacted—It removes the legislative sanction, but the Right remains unimpaired—But the House of Commons, it is said, made no complaint against this decision, and thus must be taken to have given their sanction to it; as far as it affected the discharge of the Lords in question it is plain they acquiesced in it upon general principles of discretion, as they instituted no new prosecution against them—Even if the old House of Commons had subsisted, they would have acted prudently not to begin hostilities with the new King, by reviving these Impeachments—The conviction of Oates, and the change in the temper of the times, would have probably secured the Popish Lords from conviction, if indeed they ever intended to bring more than one of them to a trial: and Lord Danby's Offences, after five years imprisonment, might well be suffered to sleep in the grave with the Prince who occasioned them, and against whom the punishment of them was obliquely directed—But had the Cases called much louder for Justice, the silence of * such a House of Com-

H

mons

* It is said Serjeant Maynard was still a member, and he was a host—But is it seriously believed that because he made no complaint he approved of this resolution? he who in 1680, on Lord Stafford's Trial, had said, “if there were no precedents for the continuance of Impeachments they ought to make one.” It is remarkable that none of the following leaders of
the

mons as this, ought not to have much weight in confirmation of the act of the Lords—The violent measures pursued at the close of the Reign of Charles the Second *, complaints of which poured in from all quarters, had so changed the mode of Election, and broken the spirit of the people; and such pains were taken in managing the Returns, that the King, whom a former House had excluded from the Throne, declared there were now not above forty Members in it that he would not himself have chosen—we might therefore rather wonder, not that they acquiesced in silence, but that they did not make a formal renunciation of this most important right, and, with † Burnet, thank them for having done no more mischief than they did.

The next step taken by the House of Lords was the introduction of a Bill for reversing the Attainder of Lord Stafford—It appears they were under great difficulty how to frame the preamble to that

the Country party in the last Parliament of Charles the Second are to be found in this; Sir W. Jones, Sir F. Winnington, Sir N. Carew, Sir W. Pulteney, Sir T. Lee, Sir T. Player, Sir H. Capell, Mr. Powle, Mr. Boscawen, Colonel Birch, Colonel Titus, Mr. Booth, Mr. Harbord, Mr. Swynfin.

* Burnet 1. 625. 639, fol. Ed.

† “ And with that the Session of Parliament ended; which
“ was no small Happiness to the Nation, such a body of Men
“ being dismissed with doing so little hurt.”

Hist. 1. 641. fol. Ed.

Bill;

Bill; that is, what grounds to allege in justification of it; and the debate upon that point alone was* adjourned to a second day. They resolved however at last to rest it solely upon his innocence, and that the Testimony on which he was convicted was false, without alleging any defect in point of Law; and in this form it passed the House; not without a protest by several Lords, who assigned this defect in the preamble as the reason of their dissent—The Comment upon this conduct of the House is so obvious, that I forbear enlarging upon it, and shall only deprecate the urging at this day, such *legal* objections to the conviction of Lord Stafford as the House of Lords, *in the first year of James the Second*, did not venture to state in public, or to transmit upon record to the other House of Parliament.

The next case that occurs, is that of the Earls of Salisbury and Peterborough, and the cotemporary one of Sir Adam Blair and others. These latter were † first impeached by the Commons, for publishing King James's declaration. The former for being reconciled to the Church of Rome; and all of them at different times committed. The Parliament in which these proceedings were had, having been dissolved, and a new one assembled, Sir Adam Blair petitioned the House of Lords to be admitted

* Lords Journals, 14. 28.

† June 26th, 1689.

to Bail, which was resolved in the Affirmative; * and at the same time a day was appointed to take into Consideration whether Impeachments continue from Parliament to Parliament. It is impossible to pass over this Petition and Reference, without remarking that neither the prisoner, nor the House, entertained the least Idea that there subsisted any † positive Rule of proceeding on the subject, such as has lately been attempted to be drawn from the then recent Resolution of 1685. Nothing being done upon the day appointed, another day was ‡ soon after fixed for taking into Consideration, whether Impeachments continue in *statu quo* from Parliament to Parliament; and || also whether the Courts in Westminster Hall may proceed in the intervals of Parliaments, after Appeals or Writs of Error are depending in this House, which likewise passed off without effect. During all this time the two Lords in the Tower patiently submitted to their imprisonment, and thus afforded their testimony, as well as that of their legal Advisers, to the legality of it, which could only be under the Idea that the Impeachment against them

* Ap. 5, 1690.

† Mr. Christian says, " This question respecting the effect of a dissolution, at that time was certainly a doubtful point."—P. 66.

‡ Ap. 8.

|| This latter point had been before agitated (March 25th) upon a particular Case before them.

was still in force : nor was it till an Act of general Indemnity had * passed, that any steps were taken for their release. † Immediately upon this, during an adjournment of the House, Lord Salisbury applied to the Court of King's Bench, to be discharged, as being clearly within the Act ; which being refused, ‡ because it was thought the party applying could not avail himself of it, without stating by plea, that he was not included within any of the Exceptions contained in it. It was then moved, that he should be admitted to bail, on the authority of Lord Danby's Case, in 1683 ; which was likewise refused, the chief reason given being “ Because the Parliament was adjourned “ for a very short time, and that was thought the “ proper place for him to apply.” The decision therefore of the Court in this case, affords little room for inference, as to the opinion then entertained on this question ; but much may fairly be collected from the conduct of the party, and the illustrative declarations of the Court. The form of the application shews most clearly that the only ground of *discharge* which was supposed by the

* May 23d, 1690.

† Easter Term.

‡ Carth. 132. Mr. J. Foster alleges, that this could not be the Reason, because the Act expressly provides that it may be taken advantage of on the general Issue ; and thinks the ground must have been, that the Court had no cognizance of his crime, the matter lying before a higher Judicature.—P. 44.

Earl himself, and his advisers, to exist, was that of the pardon; for, that failing, the next motion was, to be admitted to Bail; which, as the Court observed, would in general be an Affirmance of the Commitment; and, in this case, of the continuance of it to that time. Nor could the reason assigned by Mr. J. Foster prevent this application having been made, however it might guide the discretion of the Court in refusing it; for it must surely be as competent to them to discharge the party from such a Commitment, if the proceeding on which it was founded was *totally at an end (like commitments for Contempts), as if the crime was extinguished by a subsequent act of Pardon— But the Court, in which Lord Holt presided, who had been Counsel for Lord Danby, and could neither be ignorant of the ground of his application to be bailed, nor of the manner in which he was finally discharged by the House of Lords, is not satisfied with giving a single reason for their conduct († if indeed that reason is properly stated by the Reporter), but observes upon the case of Lord Danby, that he was denied to be bailed by several Judges till C. J. Jefferies came in, and that

* This argument is intended to apply no farther than against the *determination*, as it is called, of the Impeachment.

† I cannot help suspecting that the Earl of Salisbury's name is substituted in this place for that of the E. of Shaftesbury: but in neither way is the passage quite correct. Carth.

even that discharge upon bail to appear the next Sessions was an Affirmance of his Commitment.— They go farther, and in opposition to this, which they plainly consider as an unwarrantable act of Lord Jefferies, rely on the case of Lord Stafford, in which the same application was refused; and far from thinking that the hardships he underwent, which at the distance of ten years must be viewed without prejudice, could invalidate the effect of the legal principles established in his Trial, they add this emphatical account of it: “ And notwithstanding that Parliament was dissolved by which he was committed, yet he was continued a Prisoner, and afterwards tried *upon the same Impeachment*, convicted, and executed; *which fully proves* that Commitments by the Peers in Parliament are not made void by the prorogation or dissolution of the same Parliament.”—It is observable they draw only such a consequence from this case as was strictly applicable to that before them; but, if the whole of it is cited with approbation as an existing authority (which no one who reads it can doubt), it follows equally, from his Trial, conviction, and execution, that “ *the same Impeachment*” was still depending, “ notwithstanding that Parliament was dissolved” in which he had been impeached, as well as committed.—The Resolution of 1685, which could not be unknown to the Court, though directly applicable against this inference, is past by in silence,

either

either as being inefficient from its negative form, or extrajudicial and invalid in point of substance.

As soon as the Parliament * re-assembled, Petitions were presented to the House of Peers by the two Lords who were still Prisoners in the Tower: Lord Peterborough stated, that he had been confined almost two years, notwithstanding a dissolution and several prorogations had intervened, as also an act of free and general pardon; Lord Salisbury confined his claim to the latter ground only, possibly from the intimation he had recently received from the Judges of the King's Bench of their opinion of the invalidity of the former; and both prayed to be discharged—Again the Resolution of 1685 is neglected by those who were most interested to claim the benefit of it, as well as by those who were the proper judges of its effect; and so little was the House impressed with an idea of appealing to that, as a rule of proceeding, which must have led to an immediate discharge of the Lords in custody, that they conceive the most probable claim which they could make to their liberty must arise from the act of pardon; upon which point they order the Judges to attend, and give their opinion; this was presented to the House a few days after, and imported, that, “ if their
“ crimes were committed before Feb. 13, 1688,
“ and not in Ireland, nor beyond the seas, they

* Oct. 2, 1690.

“ were

“ were pardoned by the said Act.”—As this opinion gave no decisive answer to the question, but left the effect of the act of pardon to be collected from extrinsic circumstances, not before the House, (for, as no Articles had yet been exhibited, the date of their offences could not be ascertained from the charge itself,) it is not to be wondered that nothing final was determined at this time upon their petitions. As the case was still doubtful, the House refused to discharge them, but admitted them to bail till it could receive a more deliberate consideration.—On the same day a Committee was appointed “ to inspect and consider Precedents, “ Whether Impeachments continue in *statu quo* “ from Parliament to Parliament, and to report “ their Opinion.”—The manner in which this Committee conducted the enquiry, and the statement which they framed of the result of it, deserves particular attention, that the reader may be enabled to judge how well it is entitled to the character * of “ a full and solemn investigation of “ all the preceding Cases; and † the assertion, that all the Cases “ are stated, and not concealed.” It appears, I confess, to me, upon the fullest examination that I am able to bestow on it, that this Report contains nothing more than the heads of the several precedents; and ‡ every one of them, that

* Mr. Christian, p. 43.

† Speech attributed to Mr. Harding.

‡ In the Case of Thomas de Berkeley they omit stating that
I a day

that has any reference to the question (unless the single case of Lord Stafford), so loosely and so inaccurately stated, that if the House had proceeded upon these documents only, they could scarcely have avoided coming to the conclusion, which yet neither they, nor even the Committee itself did, that Impeachments were determined by a Dissolution.—After having mutilated the ancient precedents, in the manner shewn below, they omit any mention of the Reference in 1678, or the Resolution of 1685, and state in general, as to modern Cases, that “ none are found to continue “ from one Parliament to another, except the “ Lords who were lately so long in the Tower.” Nor are they more accurate in their statement of recent occurrences, forgetting the case of Sir William Scroggs, whose Impeachment, we have seen,

a day was given him in the next Parliament to hear Judgement, and that he was committed in the mean time. In that of the Archbishop of Canterbury, no notice is taken of the arraignment being adjourned to the next Parliament, in which it is proceeded on. In those of Ellys, De Bury, Leycester, and Spurrier, the proceedings in the second Parliament are not mentioned. Hugh Farstaff, it is said, was accused and acquitted in A°. 51. “ Sir R. Ferrers accused by the King; “ acquitted; but put under Bail to appear before the King “ any time *between that and the next Parliament.*” The Reader is requested to compare these two last Cases with the account of them above given; or, if he has the opportunity, with the Rolls of Parliament: from which the suppression will be most apparent.

continued,

continued, as well as those of the Lords in the Tower, to a subsequent Parliament. Whatever assistance therefore Mr. Petyt, whose zeal and knowledge of legal antiquities has been deservedly extolled, might have afforded the Committee in laying before them the Records in the Tower, of which he was the Keeper, the House could derive but little light from his researches, when seen through the medium of this Report.—Unlike the conduct of the former Committees of 1673 and 1678, who subjoin to the Report their Opinion of the Inference to be drawn from it, and by that means lay a ground for the House to decide upon the question before them, that part of the Reference is neglected here, so that no rule of practice can be established by agreeing or disagreeing to this Report. I notice this the rather, because an argument has been drawn from the silence of the Commons on this occasion, who, * it is said, must have seen this Report *affirming* Impeachments to be at an end; whereas there will not be found in it the slightest intimation of an Opinion, unless what can be drawn from the manner in which the precedents are stated.—The House proceeded immediately upon this Report, and, after hearing three of the Records read, their Resolution is thus recorded:—
 “ After the consideration of which precedents, and

* Speech attributed to Mr. Harding.

“ others mentioned in the debate, and reading the
 “ Orders of Mar. 19, 1678-9, and May 22, 1685,
 “ concerning Impeachments, and after long de-
 “ bate thereon, and several things moved, this
 “ Question was proposed, Whether the Lords
 “ Salisbury and Peterborough shall be now dis-
 “ charged from their Bail ?” which, after the pre-
 vious question being put, was resolved in the Af-
 firmative; and they and their sureties were, the
 same day, discharged accordingly. As this Vote
 followed so closely upon the Report above stated,
 the first impresson on the mind undoubtedly is,
 that it was the immediate Result of it. But many
 reasons will soon occur to controul, and even to
 subvert, the effect of that prepossession. It is ob-
 vious, in the first place, on a nearer view of the
 subject, that no direct inference can be drawn from
 a Resolution collateral to the decision of the point
 supposed to be in question.—The Committee were
 asked by the House, Whether Impeachments con-
 tinue in *statu quo* notwithstanding a Dissolution ?
 They give no answer to this question; and the
 House, having none to adopt from them, substi-
 tute none in the place of it.—It may be said, they
 passed over the intermediate steps of the proposi-
 tion, and came at once to the conclusion, which
 was the discharge of the Lords.—But, to render
 this argument effective, it must be shewn that this
 conclusion was the proper one from these premises,
 and that it could be drawn from no other; in both
 of

of which it seems to me to fail.—The just result from the establishment of the general proposition, that Impeachments in such a case were determined, would have been, that the Impeachment of these Lords was no longer depending, which would have operated as a discharge from the Prosecution itself, not merely from the security which they had given to attend the order of the House.—The second point to be established is equally unsupported, for it is most obvious that the discharge from bail might equally be the consequence of considerations on the Act of Pardon, or any motive of discretion that can be supposed to have influenced the House. For any thing that was done by this Resolution, the Impeachment continued in full force; the Commons might have claimed their right to proceed in it, and the House of Lords at a subsequent day might have resolved its continuance. The form of the Question thus proposed and carried, prevents its amounting to a decision of any point whatever. Should the House of Lords at this moment resolve to discharge Mr. Hastings from his bail, even after the reference to a Committee to search for Precedents, would it be urged that such a step alone, however extraordinary it might appear, would amount to a refusal to proceed in his trial; or, even if it did, that no reason could be alleged for it, but their opinion that the Impeachment against him no longer subsisted? If this conviction operated on the minds of many
of

of the Lords, the rest, amounting to a majority of the House, if they disregarded the claim of the Commons, (still more, if they could infer their acquiescence from their neglect to proceed,) might concur in the same Resolution from any of the various motives applicable to such a case. But the Protest signed on the occasion before us affords a clue, which, with the concurrent testimony of the history of the times, will lead us, if not to a clear apprehension of the effect of this Resolution, at least to the reason why it was not conceived in more explicit terms. The ground of Dissent stated by the several Lords who protested is, 1. “ Be-
 “ cause we conceive it is a Question not at all re-
 “ relating to the real debate before us; but urged
 “ upon us, *not for the sake only of the two Lords*
 “ *mentioned.*”—The obscurity, and apparent inaccuracy, of this expression, is cleared up by the account which * Bishop Burnet gives of this whole transaction. He says, “ Another debate was moved
 “ in the House of Lords (by those who intended
 “ to revive the old Impeachment of the Marquis
 “ of Caermarthen), Whether Impeachments con-
 “ tinued from Parliament to Parliament, or whe-
 “ ther they were not extinguished by an Act of
 “ Grace? The thing was well laid, and
 “ fourteen leading men had undertaken to manage
 “ the matter against him; in which the Earl of

* Hist. 2. 68.

“ Shrewsbury

“ Shrewsbury had the chief hand, *as he himself*
 “ *told me* But a discovery was at this time
 “ made that was of great consequence; and it
 “ was managed chiefly by his means; so that put
 “ an end to the designs against him for the pre-
 “ sent.”—We see then at once the person pointed
 out, for whose sake, as well as that of the two
 Lords, this question was urged upon the House;
 and though I am far from relying on the accuracy
 of this Historian for a minute detail either of facts
 or motives, yet thus much seems fairly to be col-
 lected, from what passed within his own know-
 ledge, that a certain number of leading men,
 with Lord Shrewsbury at their head, conceived
 themselves not precluded from urging the conti-
 nuance of Impeachments by any decision of the
 House then existing, and that this intended attack
 on the Marquis of Carmarthen was not put an
 end to by this, or any decision of the Lords, but
 stopped for the present in consequence of the dis-
 covery he had made of Lord Preston’s negotia-
 tions. The course of proceeding then in the
 House of Lords seems to have been, that the re-
 ference to the Committee was suggested by this
 party against Lord Carmarthen, but that his in-
 terest prevailed so much in that Committee, of
 which he himself was a member, that the Report
 was drawn up in the manner we have seen; that
 yet, in the result, the two parties were so balanced
 in the House, that, “ after long debate, and several
 things

things moved," a question was proposed, such as we have seen, which served to release the Lords from their bail, without deciding any thing upon the point in controversy. The Question which is complained of in the Protest as being "not at all relating to the real debate," must be that which was put, viz. the discharge of the two Lords; which is objected to, as not deciding the point of continuance of the Impeachment, upon which the debate had chiefly turned; and introduced with a view to protect Lord Carmarthen by preventing the House from coming to a Resolution, which in its consequences might have affected him. This construction will account for the conduct of the Committee, who declined stating any opinion, as they were directed by the House; as well as for the previous question having been moved for, by those who, with the protesting Lords, wished for an explicit adjudication of the abstract proposition. When it is said, that this reason of the Protest objects only to the introduction of the question of continuance of Impeachments, and not to the decision upon it, the whole point in dispute is assumed; for, if the considerations above advanced have any weight, there was not only no decision intended upon this question, but the ground of the Protest rests upon that very circumstance.— That the protesting Lords neither assented to the idea of Impeachments being discontinued by a dissolution, nor thought that such a determination had

had been made by the House, may be demonstrated both from their general character, and from their conduct on this occasion. The majority of these Lords were not only strenuous supporters of the popular principles on which the Government of that day had been formed, and was supported, but * six out of eight who signed this Protest had on a recent occasion expressed their opinions almost upon this very point. † It had been proposed to add, as a Rider to the Bill of Rights, “ that all par-
 “ dons upon an Impeachment of the House of
 “ Commons should be declared null and void,
 “ except it be with consent of both Houses of
 “ Parliament;” which being rejected, a Protest was signed by the Lords above mentioned, every reason of which applies as strongly to the question under consideration—‡ They allege, that Impeachments would be rendered altogether ineffectual, if the King had this power; that it would cause a failure of Justice; that the Government becomes precarious, when there is wanting a sufficient power to punish evil Ministers of State; that the King can only pardon such offences as are against himself, therefore not an Impeachment, because all

* The Lords Bolton, Stamford, Bath, Granville, Herbert, and Macclesfield.—Lord Stamford was besides the only surviving Peer who had signed the Protest in 1685.

† 23 Nov. 1689.

‡ The whole Protest is too long to be inserted in this place; the substance of it only is given above.

the Commons of England have an Interest in it, and it is at their suit;—that it is inconsistent with the Government of England to vest a Power any where that may obstruct the public Justice.—

Whatever be the propriety of these reasons, it is not credible that they should be advanced by those who thought differently on the subject of a dissolution; or that those who revived the pretensions of the Commons of 1678, which had been negatived by the Lords who received Lord Danby's plea of pardon, should, in opposition to the more reasonable claims sanctioned by the order and practice of the Lords, set up the contrary Resolution, made in *the first year of James the Second*.—If then they did not acquiesce in the notion of an Impeachment being determined by a dissolution, the argument deduced from their silence upon that head may be turned against those who advance it, and it will appear most manifest, that they did not complain of such a decision for the single Reason, because they knew it had not been made—Nor is this all; for the second Reason of their Protest states, “ that they ought to have examined Precedents of Pardons to see how far an Impeachment was concerned, or whether it could be pardoned * without particular mention in an

* This seems to have been the ground upon which Lord Carmarthen's Impeachment was conceived by the party against him, and probably by these Lords, not to be affected by the Act of Pardon.

“ Act

But in
this respect
the case of
the Earl of
Salisbury

at Peterborough was
the same: for they
also were impeached
persons.

“ Act of Grace,” &c.—which enquiry could only be at all necessary under a supposition that the Impeachment was still depending.

A further inference, that this order of discharge was not clearly deducible from the question referred to the Committee, arises from an order which was made * a short time afterwards, “ That a day be appointed for the explanation of the Votes made 13th Oct. for discharging the Earls of Salisbury and Peterborough.”—As nothing was done upon it, however, we must still remain ignorant of the precise object of this enquiry, collecting only thus much from it; that it was then apprehended an inference might be drawn from this Vote, which did not fairly result from it; and as the most obvious deduction from it was (as has been admitted), that it proceeded upon the consideration of the question referred to the Committee, it is most likely that that was the inference intended to be obviated.—If this motion was brought forward by the enemies of Lord Carmarthen, the progress of the enquiry might perhaps be stopped in consequence of the merit he had about this time acquired by his detection of the designs of Lord Preston; but this proceeds upon conjecture which it would be unfair to pursue any farther.—The two Lords having thus been released from their bail on the 13th of October, it might be expected

* 12 Nov. 1691.

that Sir Adam Blaire, and the rest, the Impeachment against whom had likewise been exhibited in the last Parliament, would have lost no time in availing themselves of a Resolution applicable to their Relief, if it had been understood to import such a determination as is supposed. Yet it is not till Dec. 2, that he petitions the House to be discharged, and then without referring to any regulation on the subject by which his case could be governed, but resting solely, as it seems, on the length of time since he had been admitted to bail: all that appears of his petition is, “ That he, “ being by order of this House, in April last, “ admitted to bail, *has ever since*, in all dutiful “ obedience, according to his recognizance, attended the pleasure of this House;” and, upon this, praying to be discharged, and his bail; which the House, without debate, ordered accordingly. Whatever were the grounds of his discharge, it is sufficient to repel any inference that can be drawn from his case, singly considered, on the present occasion, that none are stated; that the circumstance of delay alone in the prosecution by the Commons was a sufficient justification of it (though in strict propriety they ought to have been * apprized of such a step being intended), and was.

* This, however, was frequently omitted; as in Drake’s case; in that of the Lords Salisbury and Peterborough, in which it is made one reason for the Protest; in that of the Duke

was not likely to be disregarded by the House of Peers, in which a great debate had arisen, when the Impeachment was first brought up, whether they should receive it, as being against a Commoner for High Treason; and not less than twenty-one Lords protested against the Resolution to admit it.—But whatever may be collected from the case of * Sir Adam Blaire, as to his own discharge, with respect to that of Lords Salisbury and Peterborough, in which view we were considering it; the reasoning above stated seems forcible to invalidate the conclusion which seems most obviously to result from it.—An additional, and no slight inference, is drawn to the same effect, from the manner in which Mr. J. Foster considers this case, which he takes occasion to mention in two different parts of his valuable work: in † the first he is speaking of Acts of Pardon; in the ‡ second of the appointment of a Lord High Steward; and after stating it at length, and referring to the Lords Journals for the facts, he rests the discharge of Lord Salisbury entirely on the Act of Pardon.—Having

Duke of Leeds, and of the other Lords discharged from their Impeachments at the same time.

* It is observable that his case was considered as of so little importance, that it is not cited in the long and minute Report of the Committee in 1717.

† Foster, p. 45.

‡ Ibid. p. 151.

stated

stated that the King's Bench refused his application to be discharged, on the ground of the pardon, and that they referred him to the House of Lords for redress, he adds, " and there he afterwards had *the full benefit of the act*, without being " put to plead it; for on the 2d Oct. 1690," &c. (relating the proceedings in the Lords House to his discharge); and he repeats the same statement with no material variation on the second occasion which has been mentioned.—Is it to be believed that, while he examined the Journals, the only source from whence he could be supposed to have drawn the accurate account which he gives of the several stages of the proceeding (even if he had not expressly referred to them), he passed over, without notice, the reference to the Committee, which preceded the debate and resolution which he mentions? If not, with a full knowledge of every thing now before us, perhaps assisted by a more recent memory of the transaction itself, he attributes the decision to the effect of the pardon only. But I am content to waive the authority of Mr. J. Foster in point of historical correctness, if I am allowed to retain it in that of legal reasoning; suppose him ignorant of what *had* been decided by the House of Lords, though he ventures to assert it, it is sufficient for the argument, if, from all that appears, that which he states *might have been* so decided—It will at least be thought rather
a hardy

a hardy assertion, in opposition to this respectable name, *that “ it was impossible, in point of law, “ that the Lords could give the Earls the benefit “ of the Act, and discharge them, without putting “ them upon their trial;” the reason for which is given; that “ the exceptions were such, that no “ Judge or Court whatever could take notice of “ it, but upon a trial, *or upon hearing what the “ Prosecutor had to answer to it:—*To this general position, as first laid down, may be opposed, the qualifying exception at the end of the passage above cited, which admits in terms, that if the Prosecutor assents, the party may be discharged without trial; still more the conduct of the House of Lords, who consulted the Judges on the effect of the Act of Pardon, with a view no doubt of acting upon their opinion, before any trial was instituted; and, lastly, the express declaration of Mr. J. Foster, who says the Lords had the benefit of the Act of Pardon, though they certainly were never put upon their trial.—But what does the whole of this amount to? They might be discharged *in point of law*, without trial, by consent of the prosecutors; they were, *in point of fact*, without asking their consent; and upon the same occasion Mr. J. Foster has said, “ † *It will not be material to inquire whether the House did right in dis- “ charging the Earl without giving the Commons*

* Mr. Christian, p. 45.

† P. 151.

“ an opportunity of being heard, since *in fact*,” &c. This very objection is raised at the time, by the protesting Lords, in their third reason; but the stronger grounds there were for urging this defect, the more it is apparent that the case was such as to make it necessary to have pursued a contrary line of conduct.

On the whole of this proceeding, which I have examined more at large, because it seems to me the only precedent on which much reliance can be placed by those who reason differently upon this subject, it is sufficient if it has been shewn, that the decision, in point of form, amounts * to no positive rule; and that, in fact, it either did, or might, consistently with every thing that appears, have proceeded upon ground collateral to the point in question: the cases which follow will concur in establishing this conclusion.

The next occurrence is the Impeachment of the Duke of Leeds, which took place Apr. 27, 1695; to which he immediately put in his answer; and a few days after the Lords reminded the Commons of the Impeachment, and desired them to proceed, which in a conference they declined, on account of a material witness having withdrawn since the

* It is so considered by Mr. Ralph in his History. He says; it appears “ That the main drift of all, that is to say, the design against the Marquis of Carmarthen, was *evaded* by the following question, viz. Whether the Lords should be now “ discharged from their Bail?” 2. 252.

commencement of the prosecution.—The Duke complained very much of this delay in a * speech which he delivered, the same day, upon a Money Bill; and said, that “ it was in the power of a “ tinker to accuse *at the end of a Session*, and “ one might lie under it without remedy.”—He pressed the House, that, if the Commons did not reply, the Impeachment might be discharged; for if it were not, *he might lie under the reproach of it all his life*; and he concluded with making a motion to that effect; of which, however, no notice was taken.—After three dissolutions had taken place, in the year 1701 the attention of the House seems to have been called again to this case, in which the Commons had not yet been able to proceed, from the same want of evidence, by the circumstance of several other Impeachments, which had been recently brought up against the Lords Portland and Halifax, being reduced, by differences between the Houses, to the same state of cessation: and the following Order was then made: “ The House of Commons having impeached “ Thomas, Duke of Leeds, of high crimes and “ misdemeanours, on the 27th Apr. 1695, and “ on 29th of said Apr. exhibited Articles against “ him, to which he answered; but *the Commons* “ *not prosecuting*, it is ordered, That the said Im- “ peachment, and the Articles exhibited against

* Chandler's Debates, May 3, 1695.

“ him, shall be, and they are hereby, dismissed.” The obvious inference from this proceeding is, unless the good sense and decorum of the supreme Court of Judicature in this Kingdom is to be * laughed out of its usual weight and respectability, that the House of Lords conceived the subject was before them upon which they acted; and that the reason for their so acting must be allowed to be that assigned, at least till some probable cause be shewn to induce a contrary suspicion.—But they are supposed to have dismissed this Impeachment *now* because the Commons had not prosecuted it *six years before*; that is, the proceeding being “ *totally terminated and extinct*” by the dissolution, Oct. 11, 1695, the Lords in 1701 declare the Impeachment to be † *then dismissed* by their order, because the prosecutors had not been sufficiently active *while it was depending* in the Parliament in which it was preferred.—The fact assumed, too, unluckily is here as unfounded, as the reasoning is

* Mr. Christian asks every *candid* man to believe, “ that the Lords, from their zeal to resist (and perhaps to *insult*) the House of Commons, added the Duke of Leeds to the list, merely *that he might make a figure upon paper*, though they were convinced in fact *he was a perfect shadow and non-entity*.” The abstract notion of Impeachment seems here personified in the character of the Duke of Leeds, who had been so long involved in this kind of prosecution, and such is the rage for Dissolution, that his personal existence is supposed to have ceased to preserve the allegory.

† *Shall be, and they are hereby.*”

perverse.

perverse.—I have before mentioned the speech and motion of the Duke soon after he had put in his answer; which received, as it was entitled to, no other notice than an ejaculation of astonishment (as it should seem) from some Lords who cried out, “Well moved!” I should have added, that on that very day (which was within a week after the Impeachment was first brought up) the Parliament was prorogued, and sat no more before the Dissolution.—Did the Lords then complain that the Commons were dilatory in not proceeding in the prosecution three days only after the answer was put in, or did they acquiesce in the propriety of their delay when they addressed the King to issue his Proclamation for apprehending the Witnesses who had disappeared, who was no other than the Duke’s own servant, and when they agreed to except out of the Act of Pardon which passed that day “all persons who have been or shall be “impeached in Parliament during this Session”? After this detail it will scarcely be thought extraordinary (which is made another comment upon this case) that the Lords, who were urging the hardship of delaying the Impeachments against the Earl of Portland and the other Whig Lords, * did not insinuate that the Duke of Leeds had any great reason to complain.—They properly dismissed a

* Mr. Christian, p. 54.

charge which there was now no probability of being established; but as it was from the want of evidence * known to exist, and in the power of the party accused, that it failed, they were neither in haste to adopt this measure, nor induced to it by any motives of compassion or indulgence†.

I should now, in the chronological order which has been adopted, proceed to consider the Impeachment of the Earl of Oxford, which is the next parliamentary authority; but I cannot pass over the recognition of the principle, which I have endeavoured to support, delivered in the mean time by so eminent a lawyer as Lord Holt.—It is, I

* The Proclamation stated, “ That it appeared upon oath, “ before a Committee of both Houses, that Mr. Robart was “ able to give evidence and make proof of the disposal and “ application of part of the said money; and that to avoid “ justice and the manifestation of the truth, and to render all “ just and proper methods of prosecution ineffectual, he hath “ withdrawn,” &c.

† Burnet says; “ But his servant, whose testimony only “ could have cleared that point, disappearing, the suspicion “ stuck still on him. . . . Yet this whole discovery was let fall, “ and it was believed too many of all sides were concerned in “ it; for by a common consent it was never revived.” 2. 147. Mr. Ralph’s comment upon this is conceived in stronger terms than I choose to insert here. Hist. 2. 560.—The Bishop, who at that time sat in the House, says afterwards, when speaking of the dismissal of the Impeachment of the Lords Portland and Halifax, “ And because the Commons *had never insisted on their* “ *prosecution* of the Duke of Leeds, *which they had begun* some “ years before, they likewise acquitted him.” Hist. 2. 280.

admit,

admit, preserved in a Collection of Cases of no great credit for their accuracy in the Courts of Law, and the opinion itself is only delivered as an illustration, not with the authority of an adjudication, of the Case in question; but it is probable it might have been advanced on such an occasion, as being of similar import to the declaration of the same Judge in Lord Salisbury's Case, and the intrinsic Evidence of the Report itself will certainly not avail to invalidate it.—* A Writ of Error had been sued out *ad prox. Sess. Parliamenti* (that is, returnable at a certain day in the next Sessions), before which time the Parliament was dissolved, and a day fixed for the meeting of a new one—Two questions arose; 1. the constant one in Courts of Law upon this subject, Whether this Writ were a *Supersedeas* to the Execution; there not being, in this case, the delay of a Term? 2. Whether it was not so defective in point of form that it could not be a Warrant to carry up the Record to the new Parliament?—"It was agreed on," says the Reporter, "that the Court can take no notice of any extrajudicial determination or order of the Lords. And *per Holt*, "If an Impeachment be in one Parliament, and some proceedings thereon, and then the Parliament is dissolved, and a new one called, there may be a Continuance upon the Impeachment."

* *Peters v. Benning*, 13 Will. 3. 1701. 12 Mod. 604.

This,

This, to be sure, is sufficiently explicit; but a short way * is proposed of destroying its effect, by inserting, somewhere or other in the sentence, a negative particle.—Nor would I object even to this violent and flashing kind of criticism, if the whole tenor of the case fairly led to such a conclusion; but, as the objections to it seem founded at least in mistake, I must still believe it probable that such might have been the expressions of Lord Holt.—The Report is obviously composed of short Notes, printed much as they were taken, without being dilated into a regular chain of argument, or sufficiently distributed amongst the different persons who might have delivered them.—If they are accurate, all that is related passed in Court, but much may be omitted to fill up the chasms; and it does not appear how much is properly to be attributed to the Bench, or how much is only the argument of Counsel.—Till this is ascertained, contradiction must be expected; but the credit of what is attributed to Lord Holt, by name, will not be impeached unless he is expressly made to contradict himself.—This indeed is done; but it is by the Commentator, and not by the Reporter; for it is said, that, having laid down the doctrine above cited, he quoted the case of James and Bertly, “*in which*,” Mr. Christian adds, “*a Writ of Error was determined by a prorogation.*”—This

* Mr. Christian.

would

would indeed have been a contradiction, not only to what Lord Holt had just said, but to the acknowledged law upon the subject ever since 1673; but in truth the case was only cited to prove, and amounted to no more than, that, as a term intervened between the *teste* and *return* of the Writ, the party might *sue out execution*; which Lord Holt adds he remembered had been ruled in Kelyng and Hale's time, and which might equally be done whether the Writ was determined or not.—What follows, being introduced with the expression “*and it was said,*” seems rather to have been the arguments advanced, and cases cited, at the Bar; and therefore not necessary to be reconciled: they have, however, this mark of authenticity, that all the authorities are fairly and accurately given.—It is another mistake “that the whole tenor of “the case is to prove that Writs of Error abate “by a dissolution,” and a strange application of the Resolution first laid down; as if it was meant to shew “that in the year 1701 the Courts of “King's Bench were not bound by the extra-judicial order of the Lords in 1678.”—As to the former, it is again forgot that what is supposed to be the tenor of this case, is urged, if at all, against the established law founded upon that very order of 1678, and that the point before the Court was collateral to that decision.—The very question, as stated, implies that in general the Writ of Error does not abate by a dissolution; if
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it did, what doubt could arise upon the effect of it?—As to the latter, by what intuitive sagacity is this general Resolution, of not being bound by any extrajudicial order of the Lords, known to apply solely, or at all, to that of 1678, by which the Courts had ever since the making of it been governed; or with what propriety can that be called extrajudicial, by which all the Appellant Judicature of the Lords House is regulated, and which was well described by the Lords who protested in 1685 as a judicial rule and order of the House in the highest point of their power and judicature?—If I was to hazard a conjecture upon the import of this Resolution, I should think it referred to some order of the Lords, relative to the practice of the Courts of Law as to granting execution during the pendency of Writs of Error; which was the point before the Court, and which might be considered by the Judges as extrajudicial in the Lords. * Several such orders appear to have been made, in particular cases, in the year 1690, when the practice seems to have commenced; at which time a general question was proposed, “Whether any proceedings may be had in Westminster-hall, in the intervals of Parliament, after Appeals or Writs of Error depending in this House?”—The Reader will judge, then, whether any thing has been fairly urged to affect

* Lords Journals, Ap. 3. May 16, 1690.

the probability of Lord Holt's having so expressed himself on this occasion: if not, his authority is not only of general weight, but (when it is remembered that he was one of the Judges consulted in the Case of Lords Salisbury and Peterborough, and consequently not likely to be ignorant of the ground of their discharge) of particular application to the inference we have drawn from that decision.

We are now arrived at the termination of what (I fear) may have seemed a tedious investigation, in the case of the Earl of Oxford; who having been impeached in the year 1715, and committed, after several prorogations of the same Parliament, presented his petition to the Lords, May 22, 1717. He stated, in this, the proceedings on the Impeachment, and the several prorogations, and that he had remained a prisoner since July 9, 1715; and prayed the Lords to consider the circumstances of his case, assured that it was not their intention that his confinement should be indefinite.—A Committee was immediately appointed to search for such precedents as relate to the continuance of Impeachments from Session to Session, or from Parliament to Parliament, and to report.—This they did accordingly, a few days afterwards, and produced a very full statement of such precedents as they thought it necessary to refer to.—They begin their researches, however, no earlier than 1660.—In that year they find the case of Drake,

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which has been before adverted to, and soon after that of Lord Mordaunt, in which they observe the Parliament was prorogued, and no further proceeding on that Impeachment after the Prorogation; they should have added, that he received * a pardon during this prorogation.—The case of Sir W. Penn, which follows, is the only one in this Report where an Impeachment was dropped after a prorogation, without any particular reason occurring; and even in that, considering how wide the offence was supposed to spread, and the † length of time that elapsed before Parliament sat again, it may well be presumed to have been abandoned on other grounds, than those of a sense of incapacity to proceed. In that of Mr. Seymour, in 1680, a Dissolution intervened; as did likewise in that of Longueville and others, in 1698. Amongst the Indictments which are mentioned, all are proceeded upon to Judgement in the same Session, except that against Lord Stamford, which was preferred in the last Session of the single Parliament of James the Second.

The only remaining Cases in this Report are those which are relied upon in the present instance, all of them turning upon the effect of a dissolution.—Upon such a foundation stood the propo-

* This is stated by Lord Danby when he applied to be bailed.—Lords Journals, 2. 744.

† Near a year and a half.

fition submitted, on reading this report, to the House; that the Impeachment in question was determined by the intervening prorogation. As there was nothing contained in it, that could justify this conclusion, but what was drawn from cases of a dissolution; the vote proposed must have proceeded upon the idea that a prorogation had the same effect.—If the House adopted this notion, and it is highly probable they did, for the Protest lays down the principle as admitted, the decision which negatived the resolution proposed, established the same point in the case of a dissolution—if they thought a distinction existed between the two cases, their opinion upon that which was submitted to them has no necessary reference to the other, which was not under their consideration.—In this Majority were found the Lords Harcourt and Trevor, both eminent in the profession of the Law, and both well disposed to the cause of Lord Oxford. Others of his Friends, either of less experience or warmer attachment to his interest, protested against this determination with a zeal which may account for, though it will hardly excuse, the inaccuracy of their statement. They assert in this, as a ground for their dissent; 1. That there seems to be no difference in law between a dissolution and a prorogation. 2. That both have had the same effect in constant practice as to determination both of judicial and legislative proceedings.—I shall not here controvert the first of

these propositions; because, if it has any effect upon the present question, the truth of it tends to support the Idea of continuance, by adding to the precedents all those relative to a prorogation only, the decision of this very case, and the admitted duration of the present Impeachment.—But the second is so manifestly unfounded, that it would be allowing an improper degree of credit to this Protest not to advert to it.—When it is so confidently asserted, that both prorogation and dissolution have in constant practice determined the judicial proceedings of the House, the Reader must be inclined to suspect that he has been here amused with a visionary deduction of facts and principles so plainly repugnant to such an idea.—Without recurring to the cases of * Impeachments, which yet no candid person will rely on, as affording a clear rule of practice contrary to that which I have endeavoured to deduce from them; in Appeals and Writs of Error, the practice, at least for forty-four years preceding, was at that time, and has continued to the present, directly the reverse of what they suppose, and is even excepted out of their own favourite resolution in 1685.—The distinction between the judicial and legislative character of

* The Duke of Leeds, we have seen, desired the Lords to resolve that the impeachment against him should be discharged unless the Commons proceeded on it that Session: which was refused.

the House had been long felt, and acted upon; and has been traced in the foregoing pages, at least as far as the reference to the Committee in 1673, and supported by the authority of Lord Hale.

Having laid this broad foundation, which wanted nothing but correctness in point of fact to make it solid, what are they anxious to support with it? A fabric patched up in haste to serve a present purpose, and composed of such wretched materials, that it had long since stood a monument only of Ruin. This was the Resolution of 1685; which they think, “ may be weakened by the present vote,” and to which they are so partial as to assert, “ that it was founded upon the law and “ practice of Parliament in all Ages, without one “ Precedent to the contrary, except in cases which “ happened after the order 1678, which was reversed and annulled in 1685, and in pursuance “ thereof the Earl of Salisbury was discharged in “ 1690.” Here again one would be led to suppose, that this famous Resolution was the standing law of the Court, that it had established by a positive regulation some great land-mark of Justice, founded, as they state it to be, on a deliberate investigation of the previous law and practice of Parliament, and supported by the clear recognition of succeeding times. We have seen on the contrary that it was merely negative, extrajudicial, hastily conceived, and partially directed, and that
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so far from being regarded, if in its nature it could be, as a permanent rule, that no similar case had since arisen including even that then under consideration, in which the same Enquiry did not begin afresh.—It would be to repeat what has been advanced above, to controvert here the assertions respecting the grounds of that Resolution (to which may be opposed the not less confident declaration of the Lords who protested in 1685) or of its application to the discharge of Lord Salisbury; enough has been seen of the inaccuracy of this protest to prevent our taking any of its positions for granted: in general indeed the object of considering these recorded opinions of particular Peers, is not so much with a view of drawing conclusions of fact from the liberty allowed them of asserting what they conceive to be true; but to discover from their conduct and mode of opposition to the sense of the House, what had *there* been debated, and what assumed, or taken for granted. The Protest before us has been thought of much consequence on this account; for it has been said to be * “ *manifest* from it that it *must* “ *have been* the decided and unanimous opinion “ of the House of Lords, that the Impeachment “ would have abated by a Dissolution.”—This indeed is going farther in the use to be made of such protests, than I should have ventured, con-

* Mr. Christian p. 58.

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ceiving, that, whatever probable inference can be drawn from the presumptive right reasoning and good faith of the noble persons concerned, as to the opinions held by their opponents in debate, no possible mode of reasoning, no assertion of speculative facts, can make it *manifest* what other people may have thought, or even expressed, upon the same subject.—But waiving this strictness (which is indeed soon after deserted by the Author himself, who, when he repeats his assertion, introduces this qualification, “ that it is *manifest in the opinion of the dissenting Lords*”) let us take it thus reduced to the point it should be, and see how it is supported. The single ground assigned for this inference is thus given; “ *for it is here assumed as a first and incontrovertible principle*”—is that then sufficient to prove its truth; if it be, we shall soon find that it will prove too much; for this is not the only principle that is assumed; the first is, that a prorogation is equivalent to a dissolution; which it is admitted may be * false, and must be so proved, to invalidate the force of this

* It may be said they could not infer the House of Lords to have thought so, though they themselves assume it, because 87 to 45 voted against it; but the House was not called upon to vote on the parts of this syllogism, as this supposes; they only negatived the proposition, that the Impeachment was determined by the prorogation; which they would have done *a fortiori* if they held it not affected by a dissolution.

precedent.

precedent.—But in another way likewise it proves too much ; if it be *manifest* that what the protesting Lords assume, they must have thought to be the opinion of the House ; *the whole* that they assume, at least in this one proposition, must be subject to that inference : What then is this proposition ? * That a dissolution of Parliament has *in constant practice* had the effect to determine both judicial and legislative proceedings ; which, in its extended latitude, is impossible to have been the opinion of the House, because notoriously contrary to the fact, which, whatever the principle might have been, is the only thing referred to.—This reasoning however, faulty as it seems, is supported by an illustration, which, it is thought, puts it out of the reach of cavil, especially as being drawn from a science, where the deductions are expected to be correct, and the assumptions so simple as to be intuitively true.—It is urged that “ if I were ignorant of every proposition of Euclid, and convinced “ *that every one of his conclusions were false ;*” yet I should conclude that “ he was convinced that “ what he asserted as the foundation of his whole “ system, was asserted to by every man of a clear “ understanding in his time.”—Though there is

* To state this proposition fairly it must be detached from the other, which in the construction of the original is mixed with it : as it stands indeed no such proposition is actually asserted, though, I admit, it may be inferred from the context.

much advantage in appealing to a name proverbial for accurate reasoning, to illustrate the deductions of ordinary men, and to a self-evident axiom as a parallel to a complicated notion of law ; yet there is enough conceded in this statement to prevent its imposing longer than at the first glance.—If I am unacquainted with the Author of such a system, be it of morals or mechanicks, of politics or religion, all I can infer from his assuming any proposition as his basis, is, (if I give him credit for integrity) that he himself believes it to be true ; what other people may think of it, still more what those of a clear understanding may, according to his conception, I can only guess from an opinion which I have not yet formed of his judgment and accuracy, his plain sense, or his love of singularity.—But if I went further, and was “ convinced that every one “ of his conclusions were false,” I should no longer doubt, that he who reasoned so perversely upon his own principles, deduced his fundamental axioms as ill from the general sense of mankind ; and it is rather a curious limitation to human extravagance, that having attributed absurdity to two branches of a syllogism, it follows of course that the third must be true.—Change but the name then, and the subject of this allusion, and it will soon appear how little it will support the conclusion drawn from it ; in every speculation tenets may be found, on which the whole is founded, contrary to truth, as well as the common sense of

Mankind. All men are born equal, says one; another asserts, they are from their difference in natural faculties necessarily subordinate one to another, or perhaps some delivered by divine appointment to be governed by others—the Earth is the centre of the Universe, may be assumed again, as well as the present contrary persuasion—there is one God and Mahomet is his prophet, must be the language of a staunch Musselman, though he wrote in the midst of this Metropolis; and upon every one of these, a system may be, and has been built; of the truth of which therefore we may fairly suppose the Author of each was strongly persuaded, but which in some instances he must know was not the prevailing opinion of Mankind, or if he thought so in others, either he or his opponent must have been mistaken, because their assertions are directly contradictory—If we are not precluded then by this mode of mathematical demonstration from drawing our own inference from the expressions of this Protest, let us see whether they import any thing like what it is asserted they must. Had these Lords been convinced that nothing was intended to affect their favourite Resolution of the first of James the Second, nay, that it had just received the recognition of the House, even in establishing this limitation to it, would they have been so apprehensive of its being weakened by the present determination; or if they had thought that it might be affected by it in consequence

quence of the analogy which they insist upon, but which it is alledged could not have been the Idea of the majority, would they not have made the best possible use of their right to protest, by connecting with the vote that explanation of it, which the truth of the transaction enabled them to give? —They would surely have said; it has indeed been admitted in debate, that an Impeachment is determined by a dissolution, and therefore the precedent of 1685 is not meant to be disputed; but as we think a prorogation has in all cases the same effect, this decision should have conformed to that. —Thus their reasoning would have been as complete as it now stands, and the danger would have been avoided, which is made the chief subject of their complaint.—It is even highly probable, and they would have done prudently, that they would have forbore starting the point of similarity between dissolution and prorogation, from which they drew an inference against their own doctrine, which had not been done by the House.—It appears besides, from the anxiety with which they support that precedent, by urging the grounds on which it stood, and the practice which had since obtained to confirm it, that they thought its Authority was in more danger of being shaken, than was possible, if it had been so recently recognized as is supposed.—Admitted truths do not require so much support from arguments; and where a

principle is once firmly established in practice, it is not very usual to develope, whenever it is referred to, the history of its introduction, or the reasonableness of its application.—If in the present instance these were to be deduced, why should the conclusion and result of all this be omitted, and after asserting “ that it was founded on the “ law and practice of Parliament in all ages, and “ that in pursuance thereof Lord Salisbury had “ been discharged,” would they not have added, “ and which is admitted even by those who have “ come to the present Resolution to be the existing Law of Parliament to this day”?—An assertion which, if true, being within their own knowledge, and confirmed by the tacit acquiescence of the other Peers, would have proved abundantly more than their reference to the practice of remote times, in which they might be mistaken, or of which at best they had no peculiar means of information.

We have now considered, as was proposed, every thing that has occurred on this question, since the Resolution in 1678; and the fair result of the examination, with reference to the case, as it stands before the House of Peers, seems to be; that though that order no longer subsists in point of form, yet being founded on ancient practice, and established principles, and uncontrolled by the genuine decisions of subsequent times, it still exists

ists in substance confirmed, and not impeached, by the most unsuspected authorities.—I confine this view of the case to its present situation, because the Lords, who are the Judges, may consider the whole regulation of the point as exclusively of their cognizance, and resort only to their own Journals for information on the subject.—With respect to the House of Commons; when it is considered, that this is * the only precedent that passed with their concurrence, and which was attended with positive effect, they must have deserted a great constitutional ground, on which they once stood, and which they never consented to abandon, if they had determined otherwise than they did, unless it could have been proved to them, as was attempted by several Gentlemen of the Long Robe,

* Sir H. Mackworth, in the Tract before cited, says; But here we must observe a difference between Facts and Precedents. When either House hath actually passed a Vote, or done a thing, which never came to be considered by the other House, nor ever was debated and agreed to, at any conference, or otherwise, betwixt the two Houses, that is called a Fact, but cannot be insisted on as a Precedent to bind the other House. But when a matter comes in question betwixt the two Houses, and is solemnly debated and considered, and afterwards agreed to by both Houses, that is esteemed a Precedent, and ought (with great submission) to be binding and conclusive to both Houses; and no ancient Precedents are usually cited against the latter, in which all the former Precedents are supposed to have been considered.

that

that the decision involved in it such technical absurdity, and general inconvenience, as no authority could sanction, no precedent could support.-- We are next to consider the arguments which have been urged on this head.

P A R T I I I.

IT may be thought by some that I concede a good deal, in supposing it possible for such legal objections to exist against a position which has been stated, without reprehension, by such eminent sages of the law as Lord C. J. Holt and * Lord C. B. Comyns; yet unless this shall appear, and the two former grounds have been successfully established, nothing will remain to invalidate the conclusion.—These objections are of various kinds, and urged in different ways; yet I hope not to omit any that are in the least material, or to state them less forcibly than I ought.

* I am content to urge this authority no farther, convinced there is much propriety in what Mr. Christian has observed upon it, p. 70. but I can see no reason for supposing that Serjeant Hawkins was better read in the Journals of Parliament than C. B. Comyns, or that his work was designed for Judges, while that of the latter was intended only for students and practisers.

It

It may be said, that this is a Trial in the High Court of Parliament, of which the House of Commons form a part, and that by their Dissolution the Court is dissolved.—To this it might be sufficient to answer, that the objection applies equally to all judicial proceedings, civil or criminal, original or appellant; contrary both to the ancient cases, and the present practice in the latter of these.—The Judicature in Parliament was always exercised in the House of Lords alone, though the Judgement purports to be that of the King in Parliament, just as the stile of the Court of King's Bench supposes him to be present, though he actually presides in neither.—Indeed, if this were otherwise, it would hardly be consistent with Justice that the House of Commons should impeach, and thus become both accusers and Judges: and the authority of Lord Hale is alone conclusive upon the subject, who calls the House of Peers a distinct Court, and whose treatise on the subject is entitled, “Of the Jurisdiction of the Lords House of Parliament.”—Taking this then to be the Court, it is urged by others, * as “a great principle, that by a Dissolution the Writ, or Commission, by which the Court sat, and exercised jurisdiction, is at an end.”—This objection supposes, or rather artfully takes it for granted, that the Writ of Summons is the only Commission

* Mr. Christian, 160.

by which the Lords sit; which in fact is true only as applied to the time and place of their sitting.—They meet at Westminster, or Oxford, at such a day, by virtue of the King's writ, and sit no longer than he pleases; but while assembled, they exercise their functions in consequence of precedent and permanent rights*.—The Commission of the ancient Peers is their being born such, the same Commission under which the King himself exercises all his prerogatives, when the death of his predecessor makes way for his native rights being called into action.—New Peers are now chiefly created by Patent, by which they are expressly entitled to a † “*seat, place, and voice*,” in Parliament.—All this it may be said is true of such as

* Lord Hale states it as having been said in support of the Lords Jurisdiction as opposed to that of the Judges appointed by the King, and then removeable at his pleasure; “Whereas “the Lords are *judices nati*, fixed, perpetual; and though “their honours be derived from the Crown, yet being once so “derived, are hereditary in their blood;” to which he makes no objection that invalidates the inference here drawn from it. *Tract. p. 179. Foster, p. 141. Vide Addenda.*

† Yet Mr. Christian, in contradiction to this express grant, as well as to the law as admitted by Lord Hale (see last note), asserts, that a Peer “has no inherent legislative or judicial “capacity annexed to his person; and till he has received his “Writ of Summons, or *commission*, he has no *right* either to “a *voice* or *seat* in Parliament”—confounding thus the rights of the Peerage with the power and occasion of exercising them.

are created by Patent, as Dukes, Marquisses, and Viscounts, always were; and perhaps might be allowed to apply to the ancient Earls and Barons, who sat in right of territorial possessions; but that when the King creates a Baron by Writ, which he may still do, the Peer has no other title to any of his privileges but what is derived from his Summons to Parliament.—I shall not content myself with observing, in answer to this, that there are none such in the present House of Peers, but shall go a little further, to shew that if such were to be now created, they would stand on the same footing as Barons by tenure.—It appears then that about the time of King John a distinction took place between the *Barones majores*, and the rest, who held of the King *in capite*; and it is provided by Magna Charta, that the former of these shall be specially summoned to attend all Parliaments; and upon this rests the right of the Peers to their Writ of Summons. Mr. Selden thinks it probable, that soon after this period a law passed, which is not now extant, by which all were excluded from coming to the Parliament (i. e. to what is now the House of Lords) but such as had special summons, and that all who had such summons should be admitted without further proof of title; which, he says, destroyed Baronies by tenure, and constituted those by writ. Camden, who advances the same fact, differs only as to the manner of its being introduced; which he inclines to think took place

place in the reign of Henry the Third, relying on the authority of an ancient writer, who says, that he *statuit & ordinavit quod omnes illi Comites & Barones regni Angliæ, quibus Rex dignatus est brevia summationis dirigere venirent ad Parliamentum suum, & non alii*. It is clear then, from either of these accounts, more expressly from the latter, that the Writ presupposed a Right by Tenure, of which it then became the only evidence; and though it afterwards changed its application, and was directed to those who had no such title to it, yet the legal import of it was still the same, as is further apparent from the consequences which followed it: for though in form it was merely *pro hac vice*, and without any expressions of grant, or that implied a permanent duration, yet * if the person summoned took his seat under it, he acquired thereby an inheritance in the dignity by operation of law, which could only be the consequence of considering it as a † recognition of a previous right.— ‡ Some indeed have thought that two Writs, and the sitting in two Parliaments, were necessary to evince an hereditary Barony; which, if true, proves still more decisively that the Writ alone is not the

* Co. Litt. 16. B.

† This is further proved by the only modern instances in which it has been used to call up the eldest Sons of Peers in the life-time of their Father, and by one of his Baronies.

‡ Whitelocke apud Blackst. Comm. 1. 400.

Commission, but the presumptive evidence of a pre-existent right.—That this is the real state of the case is put beyond all doubt by the Writs of Summons to the Judges, and other assistants to the House of Lords, which were * sometimes conceived in the same terms as those of the Peers, and † generally so little varying from them, as by no means of themselves to mark the different lines of their duty and function, which must therefore have been discriminated by other considerations implied but not expressed.

By whatever mode then the Peers are invested with their Dignity, it is permanent in Right, and more like the most durable power of the Judges of the Courts of Westminster-hall, as they are now constituted, than those of any persons who act under temporary Commissions.—They agree in

* 22 Edw. III.

† The general form constantly used from Hen. IV. after reciting the King's intention of calling a Parliament at such a time and place, as in the summons to the Peers, goes on, *vobis mandamus firmiter injungentes* (instead of *in fide & dilectione* or *in fide & ligeantia*) *quod omnibus aliis prætermiſſis dictis die & loco personaliter interfutis nobiscum & cum cæteris de Concilio nostro super dictis negotiis tractaturi vestrumque consilium impensuri*.—The Summons to the Peers have it *nobiscum & cum cæteris Prælatiſ Magnatibus & Proceribus*, &c. In some, in the recital of the persons to compose the Parliament, that of the Peers is “*& ibidem nobiscum & cum cæteris Prælatiſ*”—that of the Judges has added to it “*ac cæteris de Concilio nostro*.” 1 Edw. III.—which is sometimes substituted for the other expression. Vide Dugd. Sum.

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deriving each their authority, at first, from an implied reference to prescriptive usage, and not from positive assignment of the limits of their respective duties.—The Writ by which a Peer is summoned, merely calls him to treat, at a particular time and place, with the *rest* of the Prelates, &c. by which he is entitled to an inheritance in the dignity, and acquires a right to the same summons in all future Parliaments.—The appointment of the Judges is derived from the expressions * “ *constituimus vos unum Justiciariorum ad placita coram nobis tenenda,*” or “ *de communi banco.*” The Courts of Law are open only in Term time, as the Court of the Lords in Parliament is only while that is sitting; but though custom has prescribed more *precisely* the duration of the former, or perhaps, more accurately speaking, the original constitution has been preserved more uniformly in one instance than the other (except where altered by positive laws), as being unconnected with state convenience or necessity; yet it seems as if both, being originally derived from the Crown, were equally subject to the controul of it.—The meetings and prorogations of Parliament were always clearly so; and in times of public sickness, or other particular occasions, the Term † has been adjourned to another

* The Judges hold their offices by Patent, the Chief Justice of the King’s Bench by Writ, in which is substituted “ *Justiciarium nostrum capitalem.*” 4 Inst.

† Frequent instances of this are to be found. In 1 Car. I.

other time and place by the ordinary exercise of the same authority.—As the inherent privileges of the Peers, as to the right of Judicature, resemble, though they far exceed in permanency, those of the Judges, it can hardly be supposed what similarity can be traced between them and those derived from Commissions granted for particular purposes, and confined to particular places.—Such are those under which the Judges exercise all their functions on the Circuits, and at the Old-Bailey; which, though they may seem to have acquired a kind of establishment from their ordinary use, rest entirely in the will of the Crown, as to persons, times, and places, to which they relate; and in form convey only a limited authority, which must be strictly pursued.—Far from bestowing, like the Patents of the Peers and Judges, by the mere title, the several Rights and Powers belonging to each, these are so confined in their operation, that no less than five of them are required to give the ordinary authority exercised on every Circuit.—Those adduced as similar, on the present occasion, are the Commissions of *Oyer and Terminer*, and of *Gaol Delivery*; by the former, power is given to certain persons to *enquire* of certain crimes in par-

two Proclamations appear to have issued for this purpose, by which Writs of Adjournment were ordered to be directed to the Judges “*to whom such Writs have usually been directed*”;—the last of them to adjourn the Term to Reading. Rym. Feod.
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ticular counties, and to *bear* and *determine* the same; by the latter, to deliver a particular gaol of all the prisoners who shall be found therein at a certain time; both conceived in such limited and appropriate terms, that one gives no authority but where the whole proceeding is before the same Commissioners, who cannot therefore try upon an Indictment not found before themselves; the other, though more general in this respect, yet extends not beyond persons who are found in the precise situation described.

If such then be the fair account of the Constitution and Permanency of the House of Peers as a Court of Judicature, there is no room for the application of those arguments which are derived from the effect of the demise of the Crown on any Commissions granted by it, or of the issuing a new Commission upon one before subsisting.—The inheritable nature of their functions distinguishes them from any other emanation of the Prerogative; and as the Writ which calls them together is not the Commission under which they act when assembled, so neither does another summons by Writ to the same individual bear any analogy to a new Commission which might be granted to different persons.

The most material of the technical objections made to the continuance of the Impeachment is that which I have never seen distinctly stated, but which arises from the actual State of this Proceeding,

ceeding, independent of the general grounds of argument as applied to others of a similar kind: I mean the topic of Discontinuance, arising from the party being put without day.—Before I advert to this objection, it is impossible not to lament, that, if it should be thought to have any weight, it owes its origin not to the inherent nature of the subject itself, but to the accidental, or, if I might so say, the inadvertent, conduct of the House of Peers. I thus state it, because, when accurately considered, it will appear to be founded entirely on the manner in which the Impeachment was adjourned, or continued, the last day of the Trial in the former Parliament, perhaps on the omission to notice the day to which it was so adjourned.—Now it can never be presumed, and the investigation carrying on at this moment precludes the idea, that the House of Lords, if they adverted to the question at all, considered it as a clear and settled point, that the Dissolution, which must necessarily in the course of things intervene before the Trial could be finished, would prevent the continuance of the Impeachment.—If they did not, and do not at this time, it will certainly be matter of very serious concern, and to none more than to the Noble Persons themselves, that by a clerical error of their own Court they are precluded from the agitation of this great Constitutional question.—In urging this consideration thus far, I hope I shall not be understood as imputing to any one, much less

less to the exalted Character who has presided with such unexampled patience and impartiality at this Trial, the smallest degree of blame in this transaction; I am very well aware that it would have been extremely difficult, if not impossible, so to have framed the form of Adjournment to avoid determining against the continuance of the Impeachment, as not to have made it decisive of the contrary; which, without previous consideration, would have been equally exceptionable.—Viewing it then only as an unfortunate accident, if attended with any consequences, both to the prosecutors, the accused, the public, and posterity; and to which therefore more effect will not be given than it shall be found necessarily to demand; let us proceed to enquire on what the objection is founded.—All legal proceedings are supposed to be carried on in the presence of the parties concerned, and at the times and places at which they have notice to attend.—As scarcely any suit, either civil or criminal, can be determined at once, it is necessary that it should often be adjourned, or, as it is termed, *continued*, by appointing the parties another time and place, at which they are to be present to attend the further proceedings of the Court.—This is so essential to connect the different stages of the suit, and the judgement to be given, with the complaint on which it is founded, or the authority on which it proceeds, that, if omitted on the records of the Court, or if any extrinsic circumstance

cumstance should happen to prevent the possibility of the party defendant appearing, or the Court itself in fact attending at the time and place assigned, he is said to be put without day, and the whole proceeding is discontinued.—The order in the present case, on which the objection is founded, stands thus on the Lords Journals, 9 June, 1790 : “ Ordered, That this House do proceed further
 “ on the Trial of Warren Hastings, Esq; on the
 “ first Tuesday in the next Session of Parliament,
 “ at ten of the clock, in Westminster-hall.”—It is become unnecessary to enquire whether “ the
 “ next Session” could by any fair construction be taken to extend to the “ next Parliament,” because, even allowing that it could, it is apparent that that day passed off without any proceedings on the Trial, and without any further adjournment of it to another. It has been added to this objection, as if thought not of itself sufficient, that Mr. Hastings is perfectly at large, and not amenable by any existing obligation to the justice of the Lords; and that, consequently, their proceeding without an object before them would be nugatory and absurd.—But whatever observations may arise on the order above mentioned, none such are applicable to the Recognizance by which Mr. Hastings and his Surety are bound, and which puts him exactly in the same situation as if he was actually imprisoned.—The condition of this is in these words : “ That if the said Warren Hastings shall
 “ appear

“ appear personally *before the Lords in Parliament,*
 “ *from day to day,* until the further order of this
 “ House, then to be void,” &c. The Party then,
 it should seem, is still before the Court, but the Im-
 peachment, it is said, is discontinued. The legal
 doctrine applicable to this subject is so little in com-
 mon use, that it is with the utmost diffidence that I
 venture to discuss it; but as I shall advance nothing
 but what is founded on established authority, the
 application only can be faulty, and will easily be
 corrected by the judicious Reader.—The objection
 here made involves two points; * 1. That the pro-
 ceeding is discontinued by giving the party an
 illegal day; 2. That supposing it otherwise, † it
 is put without day, by the Court not sitting on the
 day to which it was continued.—Giving then the
 full effect to the whole of this objection, what is
 the consequence? Not, as has been inaccurately
 urged, that the whole proceeding is abated, for
 the original Record is not necessarily affected by it.
 In the latter of these cases, which is the strongest,
 as where the Justices were prevented by death from
 coming at the day, ‡ a general Re-summons or Re-
 attachment revived the original Record; and, still
 more, a || special one *revived the whole proceedings.*

* Hawk. B. 2. c. 27. §. 89.

† Ibid. §. 106.

‡ Ibid. §. 106.

|| The form of this may be seen in 7 Rep. 29. B. The
 same is applicable to a discontinuance by the death of the King.
Com. Digest, Abatement. H. 38.

With respect to the former case, it should seem that where the process is erroneous, and the Defendant appears, he shall be compelled to answer; “for,” as * Mr. Hawkins observes, “the end of Process is to compel an appearance; and that end being served, and a legal charge appearing against the Defendant, no way discontinued, the Law will not so far regard a slip in the process, as to let the Defendant out of Court, in order only to have him brought in again in better form:” and he adds, “and in criminal cases this could not be but of the utmost ill consequence, by giving the Defendant, who is actually in the power of the Court, an opportunity of escaping.” It should further be suggested to the consideration of those interested in the decision, how far such an Error may be amended; which is hinted at by the † same Author: as, certainly, even discontinuance of process may be by consent of the parties.—In applying this doctrine to the case before us, it will not, I presume, be expected, that the ancient Writs, to which I have alluded, should be recurred to by this superior Court; but that whatever effect they were calculated to produce, may here be attained by some occasional process of a less technical form.—On the latter case, let it be examined, how far the daily appearance of the Defendant, to which he is bound by his Recogni-

* Hawk. §. 107.

† Ibid. §. 109.

zance, amounts to a waiver of errors in the process; or how far they may be rectified by the Court itself.—The analogy, I confess, appears to me sufficient for the purpose; and I shall, for my own part, rejoice, if such an expedient can be found to prevent the operation of an objection which is collateral to the main subject of discussion, and whether strictly right or wrong, can only tend to frustrate the general purposes of Justice.

The remaining Objections, which I am to consider, are derived chiefly *ab inconvenienti*, and therefore are not aimed at the foundation of this proceeding, but at the particular stages or partial views of it.

The first of these, which I shall notice, will not perhaps be seriously urged again, and is indeed given up by * one of the Advocates for the determination of Impeachments: I mean that drawn from the addition of the sixteen Scots Peers to the new Parliament.—It would indeed be absurd to suppose that the Union with Scotland should, without any express provision, make any alteration in the Rights of the People of England, or the Constitution of Parliamentary Judicature.—Suppose the Order of 1678 to have been in force at that period, would the effect of it have been altered by the accession of these Peers? If it be asserted that it would, how happens it that it still subsists in

* Mr. Christian.

that part which relates to Appeals and Writs of Error? And as to the other part, relative to Impeachments, if it is supported by principles and precedents, the effect will be the same, whether the Order had been made or not. But taking it upon general grounds, this change is, probably, not greater than is constantly taking place, in such a body, by creation and succession. Had a trial been going on when twelve Peers were introduced in one day, or had it continued through many years, as it might formerly, when, though the Parliament was of long continuance, a very short time was left for business, by a number of intervening prorogations; would either the former case, or the number of changes incident to such a duration, have altered the law of the proceedings? Such inconveniences as those are inseparable from such a Court, but they are not peculiar to it. When the Judges held their seats during the pleasure of the Crown, it might often happen that a whole Court was changed during the pendency of a suit; but * it has been held, that if all the Judges of a Court should die, or be removed, after the party had recovered before them, their successors might award execution. It may indeed be said that in such a case the whole appeared upon the Record, and that therefore the new Court could be under

* Yearly Books, 15 Hen. VII. Pasch. 5. admitted by the whole Court.

no difficulty in proceeding : but the same observation will apply to many instances of Impeachments as far as relates to their continuing at least to some extent : such was that of Lord Stafford, where the whole trial was to commence, and even the answer to be put in, after the dissolution ; and that of Drake, where the whole evidence was finished by his admitting the publication.

An objection of as little weight has been urged from the supposed incapacity of the Lords to imprison during a Dissolution, upon which this dilemma is framed ; that, if so, they must proceed without a criminal before them ; if not, they may imprison for an indefinite time. The answer in the present case is sufficiently given by the Recognizance above stated : but independently of that, it seems perfectly clear, from the several cases before cited, that the * King's Bench will not discharge

* Mr. Hawkins says, B. 2. c. 15. §. 74. “ Yet it seems to have been taken for granted, in the Lord Stafford's case, that the Court of King's Bench may, in their discretion, bail a Lord upon an Impeachment of High Treason, which in that case they refused to do, not as a matter out of their power, but as a thing they were not bound to do, and improper in consideration of the whole circumstances.—But it is observable, that it doth not clearly appear, from either of the above-mentioned Reports, whether any Parliament were sitting, at the time of the motions for such discharge and bailment, or not ; but it is certainly most likely to prevail, in such a motion, when no Parliament is sitting, nor likely soon to sit.”—The Reader will apply this passage to the

charge from a Commitment by the House of Peers, or an Impeachment, after a Dissolution; and if they bail, it must be to appear at the next Parliament. The same argument would shew that they could not proceed even after a prorogation, because in the interval they could have no controul over their prisoner. But beyond this, admitting they had no criminal before them, it affords no proof that the proceeding was abated; it might undoubtedly be inconvenient, but probably not more so than the beginning *de novo*, which yet Justice would require them to do.

Taking it then that the Record at least remains, which appears to me under this head incontrovertible, though even that was disputed by the * Resolution of 1685, for the trial had not then commenced; it is still objected, that the proceedings do not continue *in statu quo*:—the arguments in support of which, as they are deduced from supposed circumstances of inconvenience, may be answered by opposite ones of convenience and policy, and invalidated by those from analogy to admitted parts of the same proceeding.—These are

the former part of this Essay, and compare it with that cited by Mr. Christian from the same writer, to shew his opinion that all proceedings were determined by a dissolution.

* Mr. J. Foster, speaking of the attainder of the Duke of Monmouth, 1 Jac. II. adds; “ but that was a time of great
“ heat and violence, and few things then done ought to be
“ drawn into example.” Disc. 44.

supposed

supposed to affect both the Lords and Commons, and we must consider them distinctly.—The latter, it is said, can neither know how to proceed with the trial, nor to demand Judgement when it is over. With respect to the difficulty of proceeding, they have a great advantage who reason upon the present trial, which has continued much longer than any preceding, or probably any that may succeed. If the objection is good, it should apply to all cases : but let us turn to those of Lord Danby, of Drake, and of Sacheverell, and let the criminal writings be proved in a former Parliament, would the new House of Commons have any difficulty in arguing the guilty tendency of them in the next ? If the charges are supposed to be many, each is, as it were, a distinct cause ; and they may as well begin a new one, as vote it over again, supposing that all but the Record abated, and Justice required that the proceeding should not be dropped.—Even in the worst case, that of being dissolved when in the midst of a charge, they may abandon that which they are not able to complete, and demand judgement upon the rest ; or, should that be thought too material to be deserted, they may apply to the Lords for such an account of what has passed, as they themselves must be provided with, if they mean to form a fair judgement upon any proceeding that has run to great length, or been interrupted by long intervals of prorogation, as well as dissolution.—Even Courts of Law, that are to de-

cide great questions, either of civil or criminal jurisdiction, are often obliged to have recourse to means of information not to be classed under any head of legal Evidence ; the Report, as it is called, of a Judge, consisting only of the Notes which he took at the Trial, generally reviewed by himself afterward, is the foundation of all the proceedings in cases of New Trials, as well as of the Judgement of the Court, whenever it is discretionary, in Misdemeanors : much more then may such be referred to in this case by those to whom the Judgement does not belong : their function is much more like that of the King in exercising his prerogative of pardon, who always proceeds on the same kind of evidence, laid before him by the Recorder, or other Judge.—Upon this perhaps there might be two opinions ; some persons might think, that unless there was upon the face of the proceedings something harsh and unjust, some persecution of party, or some apprehension of violence in the House of Peers, they were bound in justice to their Country to carry on the Prosecution, so as to enable the Lords to pass some sort of Judgement, in the same manner as an Attorney-General would probably do a prosecution commenced by his predecessor, if he had a good opinion of his judgement and integrity ; or as he would carry into effect a Vote of the House of Commons to that purpose, even after a Dissolution : others might think themselves bound to be

as well informed of the case, before they became prosecutors, as if they were themselves Judges; which seems to be the idea of some eloquent and tender-hearted Gentlemen: are they aware then that this is impossible; that though compared in some respects to a Grand Jury, they differ from it in not proceeding in the ordinary way upon oath, which the House has no power to administer; that this difficulty must always stand in the way, whether the question be to continue or commence an Impeachment: they must therefore be content with such reasonable means of information as justify ordinary men in instituting legal enquiries, without requiring such evidence as can only be originally procured by a Court of Justice.—In the present case there is happily no real difficulty on that head, and in the course adopted any that might be apparent only is avoided.—But giving the utmost weight to this objection, the House of Commons might as well call to their bar all the Witnesses who have been examined before the Lords, to satisfy their consciences whether any thing has been proved which could justify them in proceeding to demand Judgement, as they could to enable them to re-commence the prosecution.—All this applies chiefly to the consideration of the propriety of proceeding at all; for with respect to the mode of carrying on the Impeachment, that must be learned from the documents of which the former House, and former Managers, were possessed.

fessed.—Some of those who conducted the prosecution before may still be Members of the House, and may be able to inform those who are now joined with them, as to the plan which they had adopted; the documents will still be open to them, not as Evidence, which is not now the point in question, but as Briefs prepared by Agents and Attornies, to enable the Counsel who conduct a cause to produce the necessary Witnesses in the most convenient order.—The public prosecutor in this instance is in no worse situation than many individuals in very important private concerns, who are frequently deprived of their legal advisers, and support, in the course of a long litigation, either by death or promotion to a judicial function, at the very time when they are most in want of their immediate assistance. Great part besides of the inconvenience now complained of must occur in the midst of such a long proceeding, which nothing extrinsic can prevent the possibility of lasting, at least, seven years, under the present Constitution of Parliament.—Suppose, at the end of the first or second year, it should be moved in the House of Commons to proceed no further; suppose it asserted that nothing had in all this time been proved; that the hardship of delay exceeded the punishment due to the imputed guilt: what ground of information is proposed to be laid to enable the House to decide upon such a question? Will it be said, none such can arise? The consequence

quence then is, that the House has delegated to the Managers an uncontrollable power of harassing an individual, at least as long as a Parliament can legally endure. The most surely that can be required in such a case is, that their conduct should be entitled to such a degree of confidence as not to be impeached upon allegation without proof.— I waive the consideration how far such Members as came into the House since the Impeachment was voted are implicated in this confidence, or how far the Managers may be supposed answerable for the Evidence not appearing upon the Trial with the same force that it might on the previous investigation, and the possibility of their coming forward themselves for directions whether they shall, under all the circumstances, proceed or not; the case first put is sufficient for the purpose, as it supposes proof to be called for, as a ground of procedure; if it cannot be had, injustice may be done, which in all enlightened Tribunals is as strong a principle, as that Justice may fail; if it can, I am content to take any mode of obtaining it, that can be suggested; and, when I have it, to apply it to the present supposed emergency.

But without adverting to these possible cases, let us confine our enquiries to such Objections as more immediately occur in the present state of the Impeachment in question.—The next difficulty supposed lies in the way of the new House of Commons demanding Judgement of the Lords,
either

either where they rest only upon the proofs adduced in the former Parliament, and thus directly put the accused on his defence; or where even that is complete, and nothing remains to be added on either side. In the latter case, we may suppose even the Verdict taken, and then ask, What embarrassment, either of conscience or discretion, could prevent the House of Commons from demanding Judgment?—The method of doing this is thus described by Lord Hale, as practised in five instances, in the reign of James the First; from which I presume the present would not much vary, and by which it appears how merely formal the intervention of the Commons becomes in this part of the proceeding:—"The Lords," he says, "privately agreed touching the censure, whether guilty or not; and if guilty, they proceeded to the particulars of their censure..... And when the Lords were agreed of their judgement, they sent to the House of Commons to acquaint them they were ready for Judgement: whereupon the House of Commons came up to the Lords House, with their Speaker, and demanded Judgement against the person impeached," &c. If in a case like this a new House of Commons should be at a loss to proceed, another consequence would follow from the effect of a Dissolution, not generally foreseen; for if, being foiled in this proceeding, they were to bring up a fresh Impeachment for the same facts, if legal analogies are to be

be preserved, the accused might put in a plea of *autrefois convict*, which would, without Judgement having passed, be a sufficient answer to the second charge; and thus the Dissolution would not only delay, as we have hitherto supposed, but inevitably defeat, the purposes of Justice.—Still further, would any scruple be retained, if the Verdict of the Peers, as well as the Judgement, remained to be taken; in which case an additional motive occurs for proceeding, in the opportunity afforded the accused of receiving his acquittal, if innocent. Indeed, the whole turn of this argument unfairly supposes that the party under prosecution must be guilty, and that the Commons must be satisfied with his guilt, before they can with propriety ask the Lords, Whether he is guilty or innocent?—the former of which is contrary to the humane policy of our Law; the latter derogatory from the honour and justice of the Lords.—Let us next take it, as nearer the present case, that the defence alone remained to be received in a new Parliament; do the motives of conscience and duty operate to preclude that justification? The absence of Members of the House of Commons during the proceeding is too trifling a ground of argument to require much notice; if it was their duty to attend, they must be presumed to have done so; but this in truth is not always possible, as in the case where the Trial takes place at the bar of the House of Peers: it applies, besides, equally, as many of these

these objections have been seen to do, to the question of demanding Judgement at any period whatever of the prosecution.

The other part of this objection, and which is the last that I shall notice, respects the difficulties supposed to stand in the way of the Lords themselves in proceeding on so protracted a prosecution.—But though the Judgement rests with them, and therefore the embarrassments, if any, are of a more serious nature, yet this topic seems much weaker than when applied to the House of Commons; for if, as has been shewn, and indeed must be assumed before this objection takes place, they still continue the same Court, notwithstanding their sitting is interrupted by a Dissolution, the whole is resolved into the single circumstance of duration. What then is to be done, if a Trial before them should extend through the greater part of the continuance of one Parliament? Is it expected that they should bear in their memory, like a common Jury, who yet have the assistance of a repetition of the Evidence from the Notes of the Judge, every thing that has been given in proof, at different periods, through the course of several years? Are they bound, individually, to a constant, uninterrupted attendance; which certainly, I believe, in the present instance, not one Peer has been able to bestow on the Trial? They must then necessarily refer to the Evidence, as reduced to writing by their authority; without the intention of making
which

which use of it, it is not easy to conceive for what end it has been so regularly preserved and printed. It may be said to this, that the criminal Law of England allows of no such mode of receiving Evidence; which though not strictly true (for there are cases in which declarations upon oath of a Witness since dead, authenticated by a Magistrate, are allowed in proof) may yet in general be admitted: but neither is the Court itself founded upon principles analogous to those of other Tribunals.—It is absurd in speculation, that any man should be born a Legislator and a Judge; or brought into the exercise of this latter function, in an instant, out of professions foreign to the knowledge, or study, of that Law, upon abstruse questions in which, he is to decide in the last resort.—This consideration indeed seems to have struck * Lord Hale so forcibly, that he urges it as an objection to their being the Court of ultimate Appeal, which yet they unquestionably are.—It is not easily reconcilable to general principles, that this Honour, devolving on them by inheritance, or creation, should enable them to give their voice in decision of a cause, which was heard before they became Judges—That they should be able to delegate their vote and conscience by proxy to another, which whether usual now in their judicial proceedings, certainly was so anciently, when they

* Tract. 200.

sent a Deputy to attend the House for them, and still is in their legislative functions, which is a case equally anomalous—That they should decide, upon Honour, both law and fact, while all other Courts and Juries are bound by the sanction of an oath.—All these objections are resolved into superior principles of convenience and policy.—Their inherent Nobility makes them independent, as Judges are become only in modern times—Their high rank not only secures them the most liberal Education, but by attracting the public Respect calls upon them for the qualities that deserve it—And in noble minds the extent of the trust reposed in them, awakens a proportionate zeal and caution not to abuse it.—In judicial matters they have the power to command the advice of all the existing Wisdom of the time; and a well-informed understanding, called into action either on such subjects, or discussions of fact, by a high sense of hereditary Dignity, and consciousness of important Duty, will not often err, or be forward in exercising the privilege of judging, where it cannot obtain sufficient means of information.—It is indeed liable to abuse, as well as all other institutions, both by the natural imperfections of the individuals, and by the exercise of the prerogative of the Crown in new creations.—It is enough for us to say, such is the Law and Constitution of Parliament, and it is not to

* Seld. Baronag. cap. 1.

be presumed that the Peers themselves will give up these privileges, by acting upon the ground of their inconvenience, or absurdity.—If then they are satisfied with their own capacity to judge, and not alarmed by the difficulties of this particular case, which would have been nearly the same at the end of the last Parliament, will they take into the account the supposed difficulties of the Commons, who themselves don't feel them, and who declare themselves ready to proceed on their part? In this view the case stands much stronger in the House of Peers—The principle is the same, and to be collected out of their own Journals.—Their practice after prorogation establishes a distinction between legislative and judicial functions, as well as that in Cases of Error and Appeal, which may well warrant this conclusion; and it strengthens their privileges, by making their House as a Court quite distinct from the other.—It has always appeared to me unreasonable to insinuate that they are inclined to make a separate cause of this point, in opposition to the other House—Can it be presumed that they, as a House, are interested in the delay or suppression of Justice?—Don't let it be said (though it has in former times), that as Impeachments are most likely to affect their own body in capital cases, they will not assist to establish any thing that shall promote the object of such trials.—It is not now a question, Whether they shall deprive themselves of the benefit of a

pardon, so as to stop prosecution; though even that they had the wisdom and magnanimity to give up; nor whether they shall abandon their own right of judgement on themselves; but whether their Justice shall be disappointed of its object, their time wasted by fruitless investigation, and their culprit harrassed by endless repetition of trial, in which his innocence will be sure of punishment, and his guilt very probably be enabled to escape. It cannot be supposed they will take into the consideration of this great abstract question any supposed consequences of it on the present Trial, or determine on the general rights of the subject by any reference to their own feelings and sense of private convenience. As they will not be influenced by the wishes of the prosecutors, great as their name is, or those of the accused, whom they must presume anxious to enter on his defence; so neither will they, by any hope of diminishing their own labours, by making them so enormous, that the humanity of the prosecutors will rather abandon what they think the cause of Justice, than insist upon a repetition of them.

The present occasion seems peculiarly calculated to induce a fair, dispassionate decision of a great constitutional question.—The precedents of former times, relative to characters of distinction are too much tinctured with party-spirit to afford a clear rule of inference; and those relative to inferior persons have often failed of ultimate decision.—

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It is the happiness of the present day, that the opposite currents of political opinion flow in one channel over this ground :—The question then will be considered, in all its stages, with deliberation and candour ;—the determination, if that of both Houses should be the same, will be stamped with indisputable authority.

It has been the object of the foregoing sheets to shew, that such a Resolution is founded not only in great Constitutional Wisdom, but supported by the Authority of former times, sometimes darkly working through the unformed Chaos of our Government, and sometimes blazing forth with decided principle, and well-regulated opposition to the encroachments of Power ; that no objections are raised to it that ought to impede its operation, being chiefly such as arise from the nature of the proceeding itself, and not from this arrangement of it. They whose province it is to decide upon this great question will doubtless examine it with candour, and, if they find themselves supported by precedent, and uncontrouled by technical objection, will not be blinded by any partial views of the merits of the case before them from seeing on what ground it was placed by their Ancestors, and where their Posterity will expect to find it.—PROINDE ITURI IN ACIEM ET MAJORES VESTROS ET POSTEROS COGITATE*.

* Galgacus apud Tacit.

A D D E N D A.

THE following passage from Mr. J. Foster, referred to in p. 105. being applicable to several other parts of this treatise, is here inserted : he gives it as the result not only of his own opinion, but of that of many other Judges.

“ Every proceeding in the House of Peers
“ acting in its judicial capacity, whether upon
“ Writ of Error, Impeachment, or Indictment
“ removed thither by *Certiorari*, is in judgment of
“ Law a proceeding before the King in Parlia-
“ ment ; and therefore the House in all those cases
“ may not improperly be stiled, the Court of our
“ Lord the King in Parliament.

“ This Court is founded upon immemorial
“ usage, upon the law and custom of Parliament,
“ and is part of the original system of our Con-
“ stitution.

“ It

“ It is open for all the purposes of judicature
 “ during the continuance of the Parliament: it
 “ openeth at the beginning and shutteth at the
 “ end of every session; just as the Court of
 “ King’s Bench, which is likewise in judgment
 “ of law holden before the King himself, openeth
 “ and shutteth with the Term.

“ The authority of this Court, or, if I may
 “ use the expression, its constant activity for the
 “ ends of publick justice, independent of any
 “ special powers derived from the Crown, is not
 “ doubted in the case of Writs of Error from
 “ those Courts of Law whence error lieth in
 “ Parliament, and of Impeachments for misde-
 “ meanors.”

FOST. REP. p. 141.



F I N I S.